161

Supreme Court, U.S.
FILED

No. 10-176 AUG 3 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TRACEY YOUNG,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

MARK D. PLAISANCE
OFFICE OF PUBLIC DEFENDER
EAST BATON ROUGE PARISH
300 Louisiana Avenue
P.O. Box 3356
Baton Rouge, LA 70821-3356
Tel: (225) 389-3150 Fax: (225) 389-8800
Plais77@aol.com

(Appellate Counsel of Record)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Petitioner has been indicted for first-degree murder, a crime punishable by death in Louisiana. In response to the State's pre-trial disclosure of evidence – solely eyewitness testimony – petitioner filed a notice of intent to call an eyewitness identification expert. The trial court granted petitioner's motion, holding that such testimony had scientific validity and could be relevant. After the intermediate appellate court denied the State's writ application, the Louisiana Supreme Court granted the State's writ application and vacated the trial court ruling, affirming a 28-year bar prohibiting the admissibility of eyewitness identification expert testimony.

In light of this ruling, the question presented is whether the *per se* proscription of eyewitness identification expert testimony violates a criminal defendant's constitutional right to present a defense.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

State of Louisiana, through the East Baton Rouge Parish District Attorney's Office.

Tracey Young, an individual, a citizen and resident of the State of Louisiana, and the criminal defendant.

CORPORATE DISCLOSURE

The State of Louisiana is a body politic. The East Baton Rouge Parish District Attorney's Office is a subdivision of the State of Louisiana.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
OPINIONS BELOW	1
BASIS FOR SUPREME COURT JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
SIXTH AMENDMENT	1
FOURTEENTH AMENDMENT	2
STATEMENT OF THE CASE	4
ARGUMENT	6
A *per se* proscription of eyewitness identification expert testimony violates a criminal defendant's constitutional right to present a defense	6
A. The hazards of wrongful convictions resulting from mistaken identifications call for the admission of expert testimony	9
B. Expert testimony on the reliability of eyewitness identification is admissible when the trial court performs its gatekeeper duty and determines that the testimony meets the *Daubert* standard	13

TABLE OF CONTENTS – Continued

Page

C. The national trend favors the admissibility of eyewitness identification testimony 18

CONCLUSION 22

APPENDIX

Louisiana Supreme Court Ruling ..... App. 1

Trial Court Ruling (1/14/09) ..... App. 27

First Circuit Court of Appeal Ruling (5/14/09) ..... App. 37

Denial of Motion for Rehearing (La. Sup. Ct., 5/7/10) ..... App. 39

TABLE OF AUTHORITIES

Page

CASES

Benn v. United States, 978 A.2d 1257 (D.C. 2009) 16, 17, 18

Bomas v. State, 412 Md. 392, 987 A.2d 98 (Md. App. 2010) 13

Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002) 19

Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (Pa. 1995) 13

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 6

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ..... *passim*

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 7

Johnson v. State, 526 S.E.2d 549 (Ga. 2000) 19

Moses v. Payne, 555 F.3d 742 (9th Cir. 2009) 9

People v. Lee, 96 N.Y.2d 157, 750 N.Ed.2d 63 (N.Y. 2001) 19

People v. McDonald, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709 (Cal. 1984) 20

People v. Mendoza, 23 Cal.4th 896, 98 Cal.Rptr. 431, 4 P.3d 265 (Cal. 2000) 20

TABLE OF AUTHORITIES – Continued

Page

State v. Alger, 764 P.2d 119 (Idaho Ct. App. 1998) 21

State v. Copeland, 226 S.W.3d 287 (Tenn. 2007) 12, 19

State v. DuBray, 77 P.3d 247 (Mont. 2003) 19

State v. Foret, 628 So.2d 1116 (La. 1993) 5

State v. Goldsby, 59 Or.App. 66, 650 P.2d 952 (Or. 1982) 13

State v. Holmes, 2006-2988 (La. 12/2/08), 5 So.2d 42 4

State v. McCord, 505 N.W.2d 388 (S.D. 1993) 19

State v. Schutz, 579 N.W.2d 317 (Iowa 1998) 19

State v. Young, 2009-1177 (La. 4/5/10), 35 So.3d 1042 ..... 1, 8, 14, 17

State v. Young, 2009-1177 (La. 5/7/10) 1

United States v. C. Smith, 148 Fed.Appx. 867 (11th Cir. 2005) 21

United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985) 20

United States v. F. Smith, 122 F.3d 1355 (11th Cir. 1997) 20

United States v. Moore, 786 F.2d 1308 (5th Cir. 1986) 11, 18, 20

United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) 7

United States v. Smith, 122 F.3d 1355 (11th Cir. 1997) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 621 F.Supp.2d 1207 (M.D. Ala. 2009) 9, 21

United States v. Smithers, 212 F.3d 306 (6th Cir. 2000) 20

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 9

Utah v. Clopten, 223 P.3d 1103 (Utah 2009) 15, 16, 17, 18, 21

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 7

Watkins v. Sowders, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) 10

Webster v. United States, 623 A.2d 1198 (D.C. 1993) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 1, 7, 22

U.S. Const. amend. XIV 2, 6, 22

STATUTES

28 U.S.C. §1257(a) 1

28 U.S.C. §2101(d) 1

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

United States Supreme Court Rule 13.1 1

Federal Rule of Evidence 702.....14

Utah Rules of Evidence Rule 702 22

Louisiana Code of Evidence article 702.....6, 14

OTHER AUTHORITIES

Elizabeth F. Lotus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* §1-3 at 3 (4th ed. 1997).....10

Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for the Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2929 (May 2009).....10

Jacqueline McMurtie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271 (2005) 12

OPINIONS BELOW

The Louisiana Supreme Court vacated the trial court ruling and held that eyewitness identification expert testimony is barred in Louisiana. *State v. Young*, 2009-1177 (La. 4/5/10), 35 So.3d 1042. The court denied Young's application for rehearing. *State v. Young*, 2009-1177 (La. 5/7/10).

BASIS FOR SUPREME COURT JURISDICTION

Tracey Young seeks review of the Louisiana Supreme Court judgment by Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of the Louisiana Supreme Court, the highest court in the State of Louisiana.

This application is timely filed under 28 U.S.C. §2101(d), as outlined in United States Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole

number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Petitioner Tracey Young was indicted by an East Baton Rouge Parish Grand Jury on November 9, 2006, for the first-degree murder of Aaron Arnold. The State of Louisiana seeks the death penalty. The State contends that on September 8, 2006, Arnold and co-worker Dionne Grayson were accosted, and Arnold was killed in the parking lot of the Baton Rouge, Louisiana restaurant in which they worked.

According to the pre-trial discovery provided to the petitioner, as Arnold and Grayson completed their shift and left work, Grayson realized she was out of gasoline. After they obtained gasoline from a station across the street and returned to the restaurant's parking lot, Arnold and Grayson were approached by a black male who exited a white vehicle from the passenger's side, produced a handgun, and demanded money. As Arnold reached into his rear pocket, Grayson purportedly stated, "I can't believe this; you've got to be kidding me." Grayson told police at that point the driver told the passenger to "just shoot them."[1]

---

[1] The driver of the vehicle, Sanchez Brumfield, was convicted and sentenced to death for his participation in the crime. His conviction is currently under appeal. Brumfield has invoked his right to remain silent and not testify against Young. Moreover, Brumfield's conviction and death sentence as a co-conspirator is irrelevant and inadmissible in Young's trial. *State v. Holmes*, 2006-2988 (La. 12/2/08), 5 So.2d 42.

Grayson, who was shot in the leg, could only tell police that she heard a shot and saw Arnold fall to the ground. Grayson and Nancy Segora identified Young. Segora, an illegal alien who also worked at the Olive Garden Restaurant, does not speak English and could not provide any details to the police about the incident, other than claiming Young was the shooter. Since the shooting, Segora has never appeared at any pre-trial hearing, apparently having left the country.

Because the State's evidence only consists of the eyewitness testimony – there is no forensic evidence to place Young at the scene or to connect him to the shooting – Young filed a notice of intent to call an eyewitness identification expert to testify on the factors that might affect the reliability of the State's eyewitness identifications. He moved for the court to decide before trial whether the proposed testimony meets the admissibility test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), adopted in Louisiana in *State v. Foret*, 628 So.2d 1116 (La. 1993). The trial court conducted a hearing where the defendant's expert, Dr. Roy Malpass, a Ph.D. in psychology, testified regarding his qualifications, his research, and his testimony's acceptance in other jurisdictions. One week later, the court ruled that Malpass' field of study and testimony met the *Daubert* and *Foret* standards, and that his proposed

testimony was relevant if the State used eyewitness identifications at trial.[2]

In response, the State filed a writ application with the Louisiana First Circuit Court of Appeal. That court, by a 2-1 vote, denied the State's application. Appendix 37. Subsequently, the State sought review by the Louisiana Supreme Court. That court vacated the trial court ruling on April 5, 2010. Appendix 1. One month later, the Louisiana Supreme Court denied Young's motion for reconsideration. Appendix 39.

ARGUMENT

A per se proscription of eyewitness identification expert testimony violates a criminal defendant's constitutional right to present a defense.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This right is rooted in the Due Process Clause of the Fourteenth

[2] The trial court in this case did not rule that the proposed testimony was automatically admissible. The trial court merely ruled that the proposed testimony of Dr. Roy Malpass met the requirements of Louisiana Code of Evidence article 702 and this court's *Daubert* test. The court ruled whether the evidence was admissible as relevant remained to be determined at trial. Appendix 27.

Amendment and in the Confrontation Clauses of the Sixth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The right guarantees criminal defendants "a meaningful opportunity" to present a complete defense. *Id.*

This right to present witnesses is abridged by evidence rules that "infringe upon a weighty interest of the accused" and are "arbitrary" or "disproportionate to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), quoting *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). For example, *see Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (exclusion of defense evidence of third-party guilt denied defendant a fair trial).

Moreover, this Court has held that a state rule of evidence that excludes "whole categories" of testimony on the basis of a presumption of unreliability is unconstitutional. *See Washington v. Texas*, 388 U.S. 14, 22 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), where this court rejected an evidentiary rule that precluded an alleged accomplice of the defendant from testifying on the defendant's behalf (though he could testify for the government) because it could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury," and *Rock*, supra (Arkansas' per se rule excluding all hypnotically refreshed

memory infringed impermissibly on a criminal defendant's right to testify on her own behalf).

The principle from these rules is straightforward: a state's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. *Rock*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714. Louisiana's *per se* or blanket rule violates this provision; it unconstitutionally denies Tracey Young the right to present a defense.[3] And it prevents the trial court from ever deciding whether the proposed testimony meets the requirements for admissibility of scientific testimony espoused in *Daubert* and whether the testimony is also relevant.

The issue in this case – whether a bright-line rule that excludes expert testimony on eyewitness identification violates a criminal defendant's

---

[3] While the Louisiana Supreme Court did not use the term *per se* in its majority opinion, there is no doubt it has adopted a blanket rule that bars the admissibility of eyewitness identification testimony. *Young*, 2009-1177, pps. 13-14 (La. 4/5/10), 35 So.3d at 1050 (. . . we decline to overrule our decision in *Stucke* **barring** the admissibility of eyewitness identification testimony). Moreover, the Louisiana court failed to indicate under what circumstances such testimony would be admissible. One judge took the position that such testimony is never admissible. ("Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this 'junk science' is best resolved by the adoption of a *per se*/bright-line rule of inadmissibility;" Knoll, J., concurring, 35 So.3d at 1051).

constitutional right to present relevant evidence – has not been squarely addressed by this Court. *Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009). This case presents that opportunity, particularly since a ***per se*** proscription against all eyewitness identification expert testimony is irreconcilable with *Daubert*, where this court "eschewed such categorical prohibitions of entire classes of expert conclusions." *United States v. Smith*, 621 F.Supp.2d 1207 (M.D. Ala. 2009) (emphasis added).

A. The hazards of wrongful convictions resulting from mistaken identifications call for the admission of expert testimony.

Eyewitness testimony is inherently unreliable. *See Webster v. United States*, 623 A.2d 1198 (D.C. 1993) (quoting Justice Felix Frankfurter, The Case of Sacco and Vanzetti (1927)) (The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials). The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). And yet, even though the dangers of eyewitness identification testimony remain prevalent, jurors continue to give such testimony considerable weight:

> Despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive

> to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.

Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Justice Brennan, dissenting).

These judicial pronouncements are supported by research studies that have concluded that "eyewitness error is the leading cause of wrongful convictions in the United States." Elizabeth F. Lotus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* § 1-3 at 3 (4th ed. 1997), *cited in Strickler v. Greene*, 527 U.S. 263, 307, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The starkest proof of the failure of jurors to treat eyewitness identification evidence with sufficient caution comes from the catalogue of wrongful convictions based upon identification evidence.

> Every major study of wrongful convictions in the last decade has concluded that eyewitness misidentification is the most common cause of wrongful convictions in America. Of the first 200 DNA-based exonerations, 79% of the cases involved an eyewitness misidentification.

Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for the Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2929 (May 2009).

Scientific research and court opinions from both state and federal courts reflect the obvious fact that

in most cases eyewitness testimony may make the entire difference between a finding of guilt or innocence, moreso in cases where eyewitness testimony is the only evidence. In such a case, expert testimony on eyewitness identification is critical; it is not simply a recitation of facts available through common knowledge, but a tool to assist the jury in better understanding the "common myths about an individual's capacity for perception." *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986). Therefore, expert testimony on eyewitness identification is admissible, not to diminish the credibility of the witness(es), but to enlighten the jury on the deleterious effect that certain factors can have on the accuracy of the identification.

The lack of accurate identifications has resulted in scores of reversals. Those reversals validate studies on eyewitness identification and re-enforce the importance of expert testimony on eyewitness identification.

> [S]tudies of DNA exonerations . . . have validated the research of social scientists, particularly in the areas of mistaken eyewitness identification. . . . Courts traditionally tended to exclude scientific evidence from expert witnesses in these disciplines, primarily on the basis that the testimony addressed matters within the common understanding of jurors, was confusing, or that it invaded the province of the jury to make credibility determinations. However, with the increased awareness of the role that

> mistaken identification . . . play[s] in convicting the innocent, a new trend is developing regarding the admissibility of expert testimony.

Jacqueline McMurtie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271 (2005), cited in *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007).

Expert testimony is not intended to diminish the credibility of witnesses, but is elicited to enlighten the jury with regard to certain factors such as (1) the difficulties with cross-racial identification; (2) the deficiencies in human perception and memory; and (3) the confidence or lack of confidence in the identification in light of lighting conditions, distinctiveness of the alleged culprit's appearance, and the presence of a weapon or other distraction. These are factors beyond the ken of the average layperson, and some are actually counterintuitive. Thus, expert testimony provides jurors the necessary tools in determining the reliability of a witness' identification.

B. Expert testimony on the reliability of eyewitness identification is admissible when the trial court performs its gatekeeper duty and determines that the testimony meets the *Daubert* standard.

Louisiana has placed itself in a small minority of jurisdictions that *per se* exclude all expert testimony on eyewitness identification.[4] And it does so by ignoring the mandates of *Daubert* that, in determining whether to admit such evidence, the focus "must be solely on principles and methodology and not on the conclusions that they generate." *Daubert*, 509 U.S. 579, 595. The Louisiana decision wrongly focuses on the results rather than the method because it confuses the trial court's duty under *Daubert* with the relevancy determination that must be made regarding all evidence.

> The proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702 because the testimony will not aid the jury

---

[4] According to a recent analysis done by the Maryland Court of Appeals, only three jurisdictions beside Louisiana have adopted a *per se* exclusion: *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *State v. Goldsby*, 59 Or.App. 66, 650 P.2d 952 (Or. 1982); *Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621 (Pa. 1995). *See Bomas v. State*, 412 Md. 392, 987 A.2d 98 (Md. App. 2010).

> in its deliberations, and instead, is inclined to be more prejudicial than probative in value.[5]

State v. Young, 2009-1177, p. 9 (La. 4/5/10), 35 So.3d 1042.

Both Louisiana Code of Evidence article 702 and its federal counterpart, Federal Rule of Evidence 702, provide that when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if the testimony is based upon sufficient facts or data; the testimony is the subject of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."

This court in *Daubert* established the principles that trial courts should employ when evaluating expert testimony. It urged lower courts to first consider whether the methodology underlying the testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts at issue. Under this rule, the trial court is required to determine (1) whether the technique has been subjected to peer review or publication; (2) the known or potential rate of error of the technique; (3) the existence of standards controlling the technique's

---

[5] La. C.E. 702 mirrors Fed. Rule Evidence 702.

operation; (4) the technique's reputability or, more simply put, testability; and (5) the technique's general acceptance within the scientific community. *Daubert*, 509 U.S. 579, 593-594. In performing this gate-keeping role, the trial court has wide discretion to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

But Louisiana now prevents its trial courts from performing this function by its *per se* exclusion of eyewitness identification expert testimony. More importantly, the *per se* exclusion of such testimony precludes educating the jury on factors that affect eyewitness identification. According to the Utah Supreme Court such testimony is not "a lecture to the jury about how they should perform their duties," but serves to educate the jury about the possibility of mistaken identification without unfairly favoring the defendant. *Utah v. Clopten*, 223 P.3d 1103 (Utah 2009).

> Such testimony performs two beneficial functions. First, it teaches jurors about certain factors – such as "weapon focus" and the weak correlation between confidence and accuracy – that have a strong but counter-intuitive impact on the reliability of an eyewitness. In other words, the testimony enables jurors to avoid certain common pitfalls, such as believing that a witness's statement of certainty is a reliable indicator of accuracy. Second, it assists jurors by quantifying what most people already know. An expert may discuss, for example, the

> degree to which accuracy is affected by a disguise or a long lapse between the crime and the identification. Importantly, expert testimony does not unfairly favor the defendant by making the jury skeptical of all eyewitnesses. In fact, when a witness sees the perpetrator under favorable conditions, expert testimony actually makes jurors more likely to convict. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision.

Clopten, 223 P.3d 1103, 1109.

Expert testimony does not usurp the jury's function; rather, it enhances the jury's ability to perform its duty as factfinder. The jury's responsibility in a criminal case is to critically examine the government's evidence against the most exacting legal standard, guilt beyond a reasonable doubt. This standard requires the factfinder to reach a subjective state of near certitude of the guilt of the accused. Because identification, however untrustworthy, is taken by the average juror as *absolute proof*, then expert testimony can be critical in helping to confirm – or undermine – a juror's near certitude of a defendant's guilt when the prosecution's case is grounded on the identification of eyewitnesses. *Benn v. United States*, 978 A.2d 1257, 1274 (D.C. 2009).

The Louisiana Supreme Court incorrectly assumes that expert testimony will "mislead a jury through the 'education' process into believing a certain factor in an eyewitness identification makes

that identification less reliable than it is." *Young*, 2009-1177, p. 13 (La. 4/5/10), 35 So.2d 1042, 1050. That position is untenable. An expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations will not unduly influence the jury more than any other testimony. The disbelief of eyewitnesses is not fostered by this expert testimony because the experts do not challenge the identification made by a particular witness. Rather, the experts merely provide the jury factors that impact perception. *See Benn*, 978 A.2d 1257, 1277 (Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification . . . it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror). The jury, as factfinder, still retains the power to assess the weight given to that identification.

The Louisiana Supreme Court also incorrectly believes that the unreliability of eyewitness testimony is curable through cross-examination and jury instructions. Yet, as courts have found, neither are sufficient to guide the jury through the deficiencies of eyewitness identification. At best, cross-examination may expose a lie or half-truth. But it is not effective in revealing a flaw in the identification because witnesses, although mistaken, believe in what they saw and believe in what they are saying is true. *Clopten*, 223 P.3d 1103, 1110. Similarly, jury instructions are less effective than expert testimony: (1) they are given

at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court; (2) instructions may come too late to alter the jury's opinion of a witness whose testimony might have been heard days before; (3) even the best cautionary instructions tend to touch only generally on the empirical evidence. *Clopten*, 223 P.3d 1103, 1110-1111.

As a result, the most effective way for a jury to best judge eyewitness testimony is to be told by an expert of the factors that affect identification.

C. The national trend favors the admissibility of eyewitness identification testimony.

The use of eyewitness identification testimony has reached the critical point where a *per se* rule on its inadmissibility denies a defendant the constitutional right to present a defense. *Benn*, 978 A.2d 1257, 1278-1279 (The state of social science research with respect to the reliability of eyewitness testimony has developed in recent years to the point where it can be argued credibly by defense counsel that it has reached that critical juncture). *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986) (The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point).

Except for the few jurisdictions like Louisiana that have adopted *per se* rules, there is no significant debate that the trend is for the trial court to make a case-by-case determination on the admissibility based

on the rules articulated in *Daubert* and by general rules of relevance. For example, in *Johnson v. State*, 526 S.E.2d 549 (Ga. 2000), the Georgia Supreme court overruled its prior *per se* ban on eyewitness expert testimony, holding that the admission of expert testimony regarding eyewitness identification lies in the discretion of the trial court. *See also State v. Schutz*, 579 N.W.2d 317 (Iowa 1998) (overruling state's *per se* rule excluding expert testimony on eyewitness identification); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002) (overruling state's *per se* rule excluding expert testimony on eyewitness identification); *People v. Lee*, 96 N.Y.2d 157, 750 N.Ed.2d 63 (N.Y. 2001) (expert testimony on the reliability of eyewitness identification is not inadmissible *per se*; the decision whether to admit it lies in the sound discretion of the trial court); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007) ("We have chosen to overrule [State v.] Coley's [32 S.W.3d 831 (Tenn. 2000)] conclusion that no one, regardless of credentials or experience and no matter how questionable the evidence, can provide testimony on the issue of eyewitness identification.").

Other jurisdictions have consistently ruled in favor of the introduction of expert testimony on eyewitness identification. For example, *see State v. DuBray*, 77 P.3d 247 (Mont. 2003) ([i]t shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness identification when no substantial corroborating evidence exists); *State v. McCord*, 505 N.W.2d 388, 391 (S.D. 1993) (trial court

abused its discretion in excluding expert testimony on eyewitness identification. "Certainly, jurors have some experience and common sense knowledge of factors that may cause occasional mistakes in identification; however, they do not possess an expert's comprehensive training in assessing the reliability of identification"). The admissibility of this evidence is particularly recognized, and even encouraged, in cases where there is no other inculpatory evidence against the defendant other than eyewitness identifications. *See United States v. Moore*, 786 F.2d at 1313 (5th Cir. 1986); *United States v. Smithers*, 212 F.3d 306, 317 (6th Cir. 2000). Indeed, at least one state court has determined that it "will ordinarily be error" in excluding qualified expert testimony when an eyewitness identification is key to the prosecution's case and is not "substantially corroborated" by independent evidence. *People v. McDonald*, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709 (Cal. 1984), overruled on other grounds by *People v. Mendoza*, 23 Cal.4th 896, 98 Cal.Rptr. 431, 4 P.3d 265 (Cal. 2000). Moreover, in addition to the Fifth Circuit and Sixth Circuit, the United States Third Circuit Court of Appeals held 25 years ago that the exclusion of expert testimony was an abuse of discretion when the conviction was based solely on an eyewitness identification. *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985).

In contrast to these decisions, only one Federal Circuit has a *per se* rule banning expert testimony on eyewitness identification. *See United States v. F.*

Smith, 122 F.3d 1355 (11th Cir. 1997). However, even this decision has been called into question, given the trend toward admissibility. In *United States v. C. Smith*, 148 Fed.Appx. 867, 872, n.8 (11th Cir. 2005), the court acknowledged that the defendant presented evidence that undermined the rationale for the court's 1997 decision to exclude all expert testimony and suggested that, but for being bound by precedent (until changed by either an *en banc* panel or by this Court), it was inclined to rule in favor of admitting the testimony.

Most jurisdictions in the United States leave the decision on the admissibility or inadmissibility of such testimony to the discretion of the trial court, made after considering the *Daubert* factors. *See e.g.*, *United States v. Smith*, 621 F.Supp.2d 1207, 1219-1221 (M.D. Ala. 2009) ("It would be anachronistic to categorically bar courts from employing the latest reliable scientific evidence in their effort to make sure that the trials they administer resemble as closely as possible a search for truth . . . "); *State v. Alger*, 764 P.2d 119, 127-128 (Idaho Ct. App. 1998) ("The courts should not categorically bar this new contribution of social science to the law. Rather, each introduction of a social framework – such as eyewitness observation research – should be evaluated carefully on its own empirical and legal merits. This evaluation requires trial judges to exercise a sound and informed discretion.") *Clopten*, 223 P.3d 1103, 1112 (Utah 2009) ("We ultimately hold that the testimony of a qualified expert regarding factors that have been shown to

contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of Rule 702 of the Utah Rules of Evidence").

CONCLUSION

Louisiana's decision leaves it in the minority of jurisdictions that have adopted a *per se* exclusion of expert testimony on eyewitness identification. The decision herein prevents the trial court from determining whether the proposed testimony meets the *Daubert* reliability test and, thereafter, whether the proposed testimony is relevant. The decision also denies Tracey Young the constitutional right to present a defense.

This Court should grant a writ of certiorari to determine whether Louisiana's *per se* exclusion is improper in light of the Sixth Amendment, the Fourteenth Amendment and *Daubert*.

Respectfully submitted,

MARK D. PLAISANCE
Appellate Attorney for
Tracey Young

SUPREME COURT OF LOUISIANA

No. 2009-KK-1177

STATE OF LOUISIANA

VERSUS

TRACEY YOUNG

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

GUIDRY, Justice*

The instant criminal proceeding involves the admissibility of expert testimony regarding the reliability of eyewitness identification. An East Baton Rouge grand jury indicted the defendant, Tracey Young, for first degree murder pursuant to Louisiana Revised Statute 14:30. After unsuccessful efforts to suppress eyewitness identifications of the defendant as the gunman, the defense gave notice of its intent to introduce expert testimony at trial on factors that might affect the reliability of the identifications. Following a hearing, the district court ruled the defendant's proffered expert in the field of eyewitness identification would be permitted to testify at trial in the event the State of Louisiana (hereafter, the "State") presented the identifications. The State sought review in the court of appeal, which found no error in the district court's ruling. We granted

---

* Kimball, C.J., participated in oral argument but did not participate in the deliberation of this opinion.

certiorari in this matter to address the correctness of the district court's ruling.

Upon review, we find the district court erred in allowing the introduction of the testimony of the defendant's expert. The proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702 because the testimony will not aid the jury in its deliberations and, instead, is inclined to be more prejudicial than probative in value. Therefore, for the reasons that follow, we vacate the district court's ruling granting the admissibility of the testimony of the defendant's proposed expert on eyewitness identification and remand the case to the district court for further proceedings.

FACTS

On September 8, 2006, East Baton Rouge Parish detectives responded to the late night shooting of two persons in a restaurant parking lot. Upon their arrival, the male victim, Aaron Arnold, was unresponsive with gunshot wounds to his upper body. He never regained consciousness and ultimately died from his injuries. The female victim, Dionne Grayson, was lying on the ground with gunshot wounds to her legs. She provided statements to detectives at the scene and hours after her admission to the hospital. Ms. Grayson informed detectives that, after leaving work, she and Mr. Arnold were in the process of

putting gasoline in her vehicle when a white automobile occupied by two men pulled alongside them. She stated a black male brandishing a semiautomatic handgun exited the passenger front seat and demanded their wallets. Ms. Grayson claimed the individual shot them before they could fully comply with his request. She gave a description of the gunman's physical features.

Nancy Segura witnessed the attempted robbery and shootings. She was sitting in a vehicle in close proximity to Ms. Grayson's car, while waiting for a friend to leave work. She was not noticed by the assailants. Additionally, there were several witnesses located at a nearby coffee shop who observed the driver and the white vehicle used in the commission of the crime both prior to and after the shootings. Detectives obtained statements from the witnesses.

During the course of the police investigation, a confidential informant provided detectives with information regarding the involvement of Sanchez Brumfield, the getaway driver and the defendant's cousin. This led to information from Mr. Brumfield linking the defendant and his vehicle to the crime.[1]

---

[1] The driver of the vehicle, Sanchez Brumfield, was convicted and sentenced to death for his participation in the crime. His conviction is currently pending appeal. Mr. Brumfield has stated he will not testify at the defendant's proceedings regarding his statement implicating the defendant as the gunman and the owner of the vehicle used in the commission of the crime. In the instant proceedings, the district court granted defense counsel's motion in limine to bar the State from putting

(Continued on following page)

Ms. Segura identified the defendant from a photographic lineup as the individual who shot Mr. Arnold and Ms. Grayson. Detectives ran the defendant's name in their computer files and learned that a white vehicle similar to the model described as being involved in the crime was registered to the defendant's home address. The defendant was later arrested. Near the time of the arrest, Ms. Grayson was presented with a photographic lineup and identified the defendant as the gunman. The defendant denies any involvement in the crime.

PROCEDURAL HISTORY

A grand jury indicted the defendant for first degree murder and attempted first degree murder. The State gave notice of its intent to seek the death penalty. Thereafter, it severed the charges and announced that it would proceed solely on the charge of first degree murder, although it intended to introduce evidence of the attempted first degree murder of Ms. Grayson as *res gestae*.

Defense Efforts to Suppress and Exclude Identifications

The defense moved to suppress the identifications made by Ms. Segura and Ms. Grayson alleging

---

Mr. Brumfield on the witness stand in the event the prosecution anticipated his intention to exercise his Fifth Amendment privilege against self-incrimination and remain silent.

the circumstances under which they were made were unclear. The court postponed consideration of the suppression of Ms. Segura's identification until she returned to the United States to testify at the defendant's trial. Ms. Segura is a Mexican national, who was illegally in the United States at the time of the crime. Sometime [sic] after the shootings, Ms. Segura returned to live in Mexico. At the suppression hearing, the State asserted, as it has throughout the entirety of the criminal proceedings, that it was working with the federal government to arrange for Ms. Segura's temporary return to the United States to allow her to testify at the trial.

Subsequently, the defense filed a motion in limine to exclude Ms. Segura's statements and identification of the defendant made in connection with Mr. Brumfield's trial. Based on the State's assertion that it was "feverishly" still attempting to obtain Ms. Segura's presence at the defendant's trial, the court excluded her hearsay statements, but not her testimony in the event of her appearance at trial.

The district court then proceeded with the hearing on the motion to suppress Ms. Grayson's identification. She testified that she identified the defendant from a photographic lineup conducted by police at her home two weeks after the shootings. Regarding the lineup procedure, Ms. Grayson's testimony on direct examination provided, in part:

Ms. Grayson: Basically, they gave me the lineup and, you know, said

for me to, you know, have some time. Look at it. And I really didn't need that much time. I – I identified the guy right away.

Prosecutor: Okay. How long do you believe it took you in order to pick out the individual who shot Aaron Arnold and yourself?

Ms. Grayson: Not even a minute.

Prosecutor: Okay.

Ms. Grayson: Just a couple of seconds.

On redirect, Ms. Grayson was shown the photograph used in the lineup and asked again how long it took her to select the defendant as the gunman. She responded, "[b]asically I looked at this and I picked it. I mean it – it was like five seconds. I mean it just didn't take that long at all."

On cross-examination, Ms. Grayson testified that days after her release from the hospital she was shown one or two photographic lineups prior to the one where she identified the defendant as the gunman. As to the prior lineups, Ms. Grayson testified that the detectives, as they did for the lineup where she identified the defendant, advised her that the assailant may not have been in the lineup. She contended that she was unable to "pinpoint the person" in the earlier lineups. In fact, the defendant was not depicted in these earlier photographic lineups. Ms.

Grayson stated that she was under the influence of pain medication for the earlier lineups, but confirmed that she was not taking pain medication at the time she identified the defendant. Moreover, Ms. Grayson testified that she had not seen any suspects in news coverage before she identified the defendant.[2]

Following the testimony of the officer that administered the final photographic lineup to Ms. Grayson, the district court denied the motion to suppress her identification because it found no evidence that the procedure was impermissibly suggestive.

Defense Efforts to Introduce Expert Eyewitness Identification Testimony

Subsequently, the defense filed notice of its intent to introduce expert testimony at trial on factors that might affect the reliability of the State's eyewitness identifications. It conceded Louisiana courts have been cautious in admitting expert testimony regarding the reliability of eyewitness identifications for fear of improperly influencing and invading the province of the jury, citing *State v. Stucke*, 419 So. 2d 939 (La. 1982). However, it urged that scientific advances in the study of eyewitness identifications since *Stucke* indicates [sic] the probative value of the admission of expert testimony on the subject, when

---

[2] Ms. Grayson's identification of the defendant occurred prior to his arrest being publicized.

properly admitted, outweighs any prejudicial effect on the jury's decision-making process. The defense anticipated the State would ask the district court to perform its function as gatekeeper to the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct 2786 (1993), which this Court adopted in *State v. Foret*, 628 So. 2d 1116, 1121 (La. 1993), and requested a hearing to address the proposed testimony. The State opposed the hearing, citing jurisprudence from this Court disallowing expert testimony on the reliability of eyewitness testimony.

Over the State's objection, the district court proceeded with the hearing. The defendant's proposed expert, Dr. Roy S. Malpass, Ph.D., a Texas psychology professor, testified regarding his credentials and education. He summarized his publications, professional affiliations, past and present research in facial recognition and eyewitness identification, and prior acceptance in other jurisdictions as an expert in the psychology of eyewitness identifications. Following cross-examination, the State conceded the witness was an expert in the field of psychology, but urged that the psychology of eyewitness identification is not a discipline recognized in the scientific community. The court directed its own questions to Dr. Malpass. Subsequently, the court accepted the witness as an expert in the science of psychology with a special emphasis in the field of eyewitness identification.

Thereafter, Dr. Malpass testified that he had reviewed the police reports and found that the case

presents issues of cross-race identification, gun focus, the effects of stress, estimates of confidence, and the impact of identification protocol on the outcome. He testified in general about these factors based on his research. Following the parties' submission [sic] of written argument on the issue of the admissibility of Dr. Malpass' testimony, the district court ruled that the defense's expert would be permitted to testify at trial. Relying on its gatekeeping function articulated in *Daubert* and *Foret*, the court stated that the proposed testimony would be relevant in the event the State utilized eyewitness identifications at trial.

The State sought writs from the court of appeal contending the district court abused its discretion in finding that the proposed expert testimony would be relevant and not confusing to the jury. The court of appeal denied the State's writ application with one dissent. The dissenting member of the panel would have granted the writ to reverse the district court. He assigned the following reasons:

> A witness qualified as an expert by knowledge, skill, experience, training, or education may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. La. Code Crim. P. art. 702. The requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). Herein,

> defendant failed to show that the proposed expert testimony on eyewitness identification met the standard of evidentiary reliability. Moreover, the prejudicial effect of the proposed testimony outweighs its probative value because of the substantial risk that the expert witness will have a greater influence on the jury than other evidence presented at trial. Such evidence presents the danger of invading the province of the jury and usurping its function. *See State v. Higgins*, 2003-1980 (La. 4/1/05), 898 So. 2d 1219, 1240; *State v. Stucke*, 419 So. 2d 939 (La. 1982).

State v. Young, unpub., 09-0154 (La. App. 1 Cir. 5/14/09) (Kuhn, J., dissenting).

This Court granted the State's application for certiorari to review the correctness of the district court's action regarding the admissibility of the proposed expert's testimony. *State v. Young*, 09-1177 (La. 9/18/09), 17 So. 3d 383.

LAW

A determination regarding the competency of a witness is a question of fact. *Cheairs v. State ex rel. Dept. of Transp. & Dev.*, 03-0680, p. 5 (La. 12/3/03), 861 So. 2d 536, 541. It is well settled that a trial judge is vested with wide discretion in determining questions of fact. Therefore, rulings on the qualifications of an expert witness will not be disturbed on appeal absent manifest error. *Id.*

Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony. It provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *State v. Higgins*, 03-1980, p. 33 (La. 4/1/05), 898 So. 2d 1219, 1239. Notably, this Court has placed limitations on this codal provision in that, "[e]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." *Stucke*, 419 So. 2d at 945.

In *Foret*, this Court adopted the guidelines set forth by the United States Supreme Court in *Daubert* for determining the reliability of expert scientific testimony under Louisiana Code of Evidence article 702. *Foret*, 628 So. 2d at 1121. *Daubert* set a new standard to assist trial courts in evaluating the admissibility of expert testimony. It requires district courts to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.*, 509 U.S. at 589, 113 S.Ct. at 2795.

In addressing the issue of reliability, *Daubert* articulated the following non-exclusive factors to be considered by district courts in determining the admissibility of expert testimony:

(1) The "testability" of the scientific theory or technique;

(2) Whether the theory or technique has been subjected to peer review and publication;

(3) The known or potential rate of error; and

(4) Whether the methodology is generally accepted in the scientific community.

Cheairs, 03-0680 at 7, 861 So. 2d at 541.

The United States Supreme Court later held in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999), that the *Daubert* analysis is to be applied to determine the admissibility of all expert testimony, not just scientific testimony. *Cheairs*, 03-0680 at 7, 861 So. 2d at 541.

The issue of the admissibility of expert testimony on eyewitness identification is not a *res nova* issue for this Court. Rather, it is undisputed that the admissibility of expert testimony on eyewitness identification has been uniformly barred by this Court on the occasions the issue has been raised. The earliest decision addressing the subject is *Stucke*, which was rendered over a decade prior to the *Daubert* and *Foret* decisions. In *Stucke*, a defendant appealed his conviction for aggravated battery contending that the trial court erred in refusing to permit expert psychological testimony regarding the ability of a witness to perceive and recall events pertaining to the shooting

at issue. The defendant called as a witness an experimental psychologist to "enlighten the jury as to the quality of the victim's identification so that the jury would have a standard against which they could make an evaluation of the victim's identification." *Id.*, 419 So. 2d at 944. In excluding the proffered expert testimony, the district court expressed "grave doubt about the competency of this evidence," citing concern over the fact the proposed expert's studies were based on mock scenarios. The court rejected the testimony concluding that the jury did not need the testimony to evaluate the witness' identification of the defendant and that the jury's standard in judging such evidence was within their own training and experience. Following a review of cases in other jurisdictions where the issue of the acceptance of expert testimony regarding eyewitness identification had arisen, this Court found no error in the district court's failure to admit the expert's testimony:

> We conclude that the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.
>
> We therefore conclude that the trial court did not abuse his [sic] discretion in failing to allow the expert witness to testify. The testimony

> sought to be elicited from him would not have been an aid to the jury.

Id., 419 So. 2d at 945.

In State v. Higgins, 03-1980, pp. 33-35 (La. 4/1/05), 898 So. 2d 1219, 1239-40, this Court's second occasion to address the issue of admission of eyewitness identification testimony, we again determined the proposed expert testimony was unnecessary.[3] This decision did not reference *Daubert* or *Foret*, although it was decided after the adoption of the new test for the admissibility of expert testimony. Addressing *Stucke*, this Court stated:

> Because of the risk that expert testimony on eyewitness identification "will have a greater influence on the jury than other evidence presented at trial," and because such evidence presents the danger of "'invad[ing] the field of common knowledge, experience, and education of men [ ]'" this Court has held that the prejudicial impact of such evidence would substantially outweigh its probative value. *Stucke*, 419 So. 2d at 945 (quoting

---

[3] The defendant sought to call an expert in eyewitness identification to explain to the jury his findings that intoxication greatly increases the likelihood of false identification, that little correlation exists between the confidence expressed by an eyewitness and the actual reliability of that witness' identification, that the chance of misidentification increases with the length of time between incident and identification, and that facts gathered from secondary sources after observing the event in question tend to skew a witness' perception of that event.

> 3 Am.Jur.2d, Expert and Opinion Evidence, § 21; 100 A.L.R.2d 1421, 92 A.L.R. 1223).
>
> *Higgins*, 03-1980 at 33-34, 898 So. 2d at 1240.

Applying *Stucke* to the facts in *Higgins*, we found no error in the trial court's exclusion of the evidence on the basis that the expert's specialized knowledge would impinge on the province of the jury:

> While the defendant claims that the particular facts of this case present the rare instance in which the "'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity," *Stucke*, 419 So. 2d at 951 (Lemmon, J., concurring), with the possible exception of the effect of alcohol on Brown's ability to process the world around her, the proposed expert testimony likely presented an invasion into a reasonable juror's common knowledge. *See State v. Ammons*, 208 Neb. 797, 305 N.W.2d 812, 814 (1981) (the prejudicial effect of a psychologist's testimony on a witness's identification outweighs its probative value); *see also [State v.] Ford*, 608 So. 2d [1058] at 1061 [(La. App. 1st Cir. 1992)] (expert testimony regarding the fallibility of human perception and memory generally is unnecessary to resolve the issues regarding the reliability of an identification); *see generally* Elizabeth Loftus, Eyewitness Testimony Civil and Criminal (1997). The trial court thus properly excluded this expert testimony, and

> defendant's third assignment of error fails to have merit.

Higgins, 03-1980 at 34-35, 898 So. 2d at 1240.

See also State v. Bozeman, pp. 4-8 (La. App. 5 Cir. 1/30/07), 951 So. 2d 1171, 1173-1176 (appellate court examined *Stucke* in light of *Higgins*, ultimately finding no error in excluding proffered expert testimony on eyewitness identifications).

We now apply this codal and case law to the facts.

DISCUSSION

The State argues the district court misapplied the tests articulated under *Daubert* and *Foret*. Specifically, it contends the court erred in qualifying Dr. Malpass as an expert in a field before determining whether the discipline itself satisfied the standards for reliability. The State argues that the "field of eyewitness identification psychology" has no known error rate, its findings are insufficiently quantifiable, and its theories are not falsifiable. It contends there has been no new jurisprudence or compelling scientific advances, since this Court's seminal decision in *Stucke*, to warrant reconsideration of this Court's ban on expert testimony regarding the validity of eyewitness identification. The State also contests the district court's findings as to Dr. Malpass' qualifications as an expert and the relevancy of his testimony.

Conversely, the defense urges the district court properly performed its gatekeeping function articulated under *Daubert* and *Foret*. It claims emerging social science research in the field of eyewitness identification validates the reliability of the proposed testimony and, as such, warrants this Court revisiting the vitality of *Stucke*. As evidence of the recognized field of study, the defense relies on the fact several jurisdictions that previously barred the admission of such testimony have changed their position on the issue.[4] It also contends Dr. Malpass is well-qualified to testify as an expert based on his professional background, which includes publicly-funded research and his participation in developing law enforcement guidelines, and his extensive history of testifying as an expert in numerous other court proceedings.

This Court is cognizant of the ongoing legal debate over the admissibility of expert psychological testimony on the validity of eyewitness identification. Generally, criminal defendants suggest jurors are ignorant of the alleged inadequacies of eyewitness testimony. Their proposed remedy is to allow qualified cognitive and memory experts to essentially

---

[4] The defense cites to post-Stucke decisions from other jurisdictions that have held expert evidence on the general deficiencies of eyewitness identifications to be admissible under some circumstances: *Echvarria v. State*, 108 Nev. 734 (Nev. 1992); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994); *United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998).

educate jurors on the factors allegedly outside of the common experience that contribute to unreliability and inaccuracies in eyewitness testimony. These factors would include observations involving significant stress, weapon focus, cross-race identification, identification based on time delays, and psychological phenomena, such as the feedback factor and unconscious transference, among others.[5] *See United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001).

Unquestionably, eyewitness identifications can be imperfect. However, upon review, the touted advances in the social sciences regarding the validity of eyewitness identifications do not render obsolete the underlying premise for which such evidence was held to be inadmissible in *Stucke*. There is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial. *Higgins*, 03-1980 at 33-34, 898 So. 2d at 1240; *Stucke*, 419 So. 2d at 945. By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to

---

[5] "Feedback factor" involves the effect of post-event information on the memory of the event, including discussions among witnesses that may unconsciously reinforce mistaken identifications. "Unconscious transference" allows a person to remember a face but not the circumstances under which the person saw the face.

mislead a jury through the "education" process into believing a certain factor in an eyewitness identification makes that identification less reliable than it truly is. *See United States v. Angleton*, 269 F.Supp.2d 868, 873-874 (S.D. Tx. 2003); *United States v. Lester*, 254 F.Supp.2d 602, 608-609 (E.D. Va. 2003). Moreover, expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications. The expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. This fosters a disbelief of eyewitnesses by jurors.

This Court has long been reluctant to allow experts to offer opinions on the credibility of another witness for fear of the expert invading what is considered the exclusive province of the jury. Moreover, the concept of promoting battles of experts over whether the testimony of every witness is truthful and reliable is not desirable. These considerations are especially compelling in cases involving eyewitness identifications where any alleged deficiencies could easily be highlighted through effective cross-examination and artfully crafted jury instructions. *United States v. Rincon*, 28 F.3d 921, 921 (9th Cir. 1994); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993).

With this in mind, we decline to overrule our decision in *Stucke* barring the admissibility of eyewitness

identification testimony. We conclude the district court erred in finding the proposed testimony satisfied the standard for admission of expert testimony under Louisiana Code of Evidence article 702.[6] The testimony will not assist the jury in its deliberations.

CONCLUSION

There is no reason for us to disturb our earlier ruling in *Stucke* barring the admission of the expert testimony at issue. The proposed testimony on the general factors potentially contributing to a misidentification does not satisfy the standard articulated under Louisiana Code of Evidence article 702. While being aware of the vast discretion to be afforded to trial courts in their determinations of the admissibility of expert evidence, we find the district court abused its discretion in allowing Dr. Malpass to testify at trial.

---

[6] Even those jurisdictions which allow this type of expert testimony have held that it is not admissible when there is substantial evidence of corroboration. *See, e.g., U.S. v. Martin*, 391 F.3d 949 (8th Cir. 2004); *U.S. v. Crotteau*, 218 F.3d 826 (7th Cir. 2000); *Manley v. State*, 672 S.E.2d 654 (Ga. 2009); *People v. Goodwillie*, 147 Cal.App. 4th 695 (2007); *People v. Jones*, 30 Cal.4th 1084, 1112 (2003); *People v. McDonald*, 37 Cal.3d 351 (1984).

DECREE

For the reasons stated herein, the ruling of the district court permitting the admission of the defendant's proposed expert testimony on the validity of eyewitness identifications is vacated. The case is remanded to the district court for further proceedings.

DISTRICT COURT JUDGMENT VACATED; CASE REMANDED TO THE DISTRICT COURT

SUPREME COURT OF LOUISIANA

NO. 2009-KK-1177

STATE OF LOUISIANA

VERSUS

TRACEY YOUNG

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT; PARISH OF EAST BATON ROUGE

JOHNSON, Justice, concurs and assigns reasons.

I concur with the majority opinion vacating the district court's ruling permitting the admission of testimony by defendant's expert on the validity of eyewitness identification. However, I disagree with the majority's finding that *State v. Stucke*, 419 So.2d 939, 945 (La.1982) serves as a complete bar to the admission of expert testimony regarding eyewitness identification. In *Stucke*, this Court held that the trial court did not abuse its discretion in excluding expert

witness regarding the quality of an identification. This Court, in addressing the then *res nova* issue, reasoned as follows:

> [T]he prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.
>
> *State v. Stucke*, 419 So.2d at 945.

Other Louisiana courts have relied upon the *Stucke* decision when denying the admissibility of expert witness testimony on eyewitness identification.[1] Although not legislatively overruled, the *Stucke* case must be examined in light of the provisions of the Louisiana Code of Evidence regarding expert testimony that followed the *Stucke* decision, since the *Stucke* decision was rendered prior to the enactment of the Louisiana Code of Evidence and repeal by Acts 1988, No. 515, § 8 of the provisions in La.R.S. 15:464 et seq., regarding expert testimony.

---

[1] See *State v. Gurley*, 565 So.2d 1055, 1057-1058 (La.App. 4th Cir.1990), it denied,575 So.2d 386 (La.1991); *State v. Coleman.*, 486 So.2d 995, 1000 (La.App. 2d Cir.), writ denied,493 So.2d 634 (La.1986).

The trial in the instant case occurred after January 1, 1989, therefore the provisions of the Louisiana Code of Evidence are applicable to the case herein.

La.C.E. art. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of un-due delay, or waste of time.

La.C.E. art. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *State v. Ford*, 608 So.2d 1058 at 1062, (1st Cir 1992).

Rather than establishing a brightline rule, our jurisprudence has determined that the admissibility of expert witness testimony should be made on a case by case basis. In *State v. Chapman*, 436 So.2d 451, 453 (La.1983), the trial court allowed expert testimony concerning studies which generally reflected the fallibility of eyewitness identification in certain circumstances. Although the question of admissibility was not an issue on appeal in *Chapman*, this Court, in a footnote, cited the *Stucke* decision, and discussed the concurring opinion in *Stucke* which emphasized the trial court's discretion in admitting such evidence,

in the interest of justice, when the court determines that the proffered evidence would assist the jury in deciding the question of identity.

The United States Supreme Court noted the inherent problems in eyewitness identification testimony decades ago in its first attempt to establish constitutional safeguards governing the admission of eyewitness evidence of identification in criminal trials.[2] The Court, in a trilogy of cases,[3] stated: "The vagaries of eye-witness identification are well known; the annals of criminal law are rife with instances of mistaken identification. . . ."[4] Although the majority concludes that the expert testimony on eyewitness identification somehow invades the province of the jury, Federal Rules of Evidence have eliminated this rationale, providing that: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). Additionally, this reasoning has been explicitly rejected by the federal courts.[5]

---

[2] Nathan R. Sobel, *Eye-witness Identification*, Legal and practical problems 1 (2d ed. 1981).

[3] *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

[4] *United States v. Wade*, 388 U.S. at 288 (footnotes omitted).

[5] See *United States v. Rogers*, 769 F.2d 1418, 1425 (9th Cir. 1985), and the U.S. Supreme Court's rejection of a similar

(Continued on following page)

In the case at bar, I agree, that based on the facts presented, the court of appeal was correct in reversing the trial court's ruling admitting the expert testimony because there were multiple eyewitnesses, and ample corroborating evidence to support defendant's conviction. The fallibility of human perception and memory, in general, is consideration in those cases where the lone witness' identification is not supported by other testimony or evidence. It is my view, that expert witness testimony regarding the reliability of eyewitness identification is not *per se* inadmissible in every case.

SUPREME COURT OF LOUISIANA

NO. 09-KK-1177

STATE OF LOUISIANA

VERSUS

TRACEY YOUNG

KNOLL, Justice, additionally concurring.

The *Daubert/Foret* standard of evidentiary reliability requires an expert's opinion be grounded in methods and procedures of ***science***, rather than subjective belief or unsupported speculation. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469

---

argument in *Bare-foot v. Estelle*, 463 U.S. 880, 899, 103 S.Ct 3383, 3397-98,77 L.Ed. 1090 (1983).

(1993); *State v. Foret*, 628 So.2d 1116 (La. 1993). In light of the record evidence demonstrating the "field of eyewitness identification psychology" has no known error rate, no reliable testing format, insufficiently quantifiable findings, non-falsifiable theories, and lacks a methodology generally accepted in the scientific community, I find the State has more than convincingly demonstrated an expert's testimony regarding this "field of eyewitness identification psychology" will never be able to satisfy the applicable standard. Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this "junk science" is best resolved by the adoption of a *per se*/bright-line rule of inadmissibility.

SUPREME COURT OF LOUISIANA

NO. 2009-KK-1177

STATE OF LOUISIANA

VS.

TRACEY YOUNG

WEIMER, J., concurring.

Because there are facts in this matter which corroborate the eyewitness identification, I concur in the result.

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION VII
STATE OF LOUISIANA
VERSUS NO. 10-06-0811
TRACY [sic] YOUNG

RULING

WEDNESDAY, JANUARY 14, 2009

THE HONORABLE JUDGE
DONALD JOHNSON PRESIDING

APPEARANCES:	FOR:
MR. AARON BROOKS	STATE OF LOUISIANA
MR. MARK MARINOFF	TRACY YOUNG
MS. MARGARET LAGATTUTA	TRACY YOUNG

REPORTED BY:
SUSAN JACKS LATHAM
C.C.R. NO. 93002

FILED January 15, 2009
[Illegible]

* * *

[3] **WEDNESDAY, JANUARY 14, 2009**

THE COURT: THE COURT IS GOING TO RECESS FOR APPROXIMATELY 15 MINUTES. I DON'T THINK IT WILL GO LONGER THAN 15 MINUTES, SO WE STAND AT RECESS FOR 15 MINUTES.

REPORTER'S NOTE: (RECESS TAKEN)

THE COURT: ALL RIGHT. LET'S RESOLVE THE MATTER OF **STATE VERSUS YOUNG**.

MR. MARINOFF: GOOD MORNING, YOUR HONOR. MARK MARINOFF WITH MARGARET LAGATTUTA PRESENT IN COURT WITH TRACY YOUNG.

MR. BROOKS: AARON BROOKS FOR THE STATE OF LOUISIANA.

THE COURT: VERY WELL. DID EITHER SIDE SUBMIT ANY OTHER WRITTEN MATERIAL FOR THE COURT TO CONSIDER ON YOUR ARGUMENT?

MR. MARINOFF: YES, SIR, YOUR HONOR.

MR. BROOKS: I SUBMITTED MY –

THE COURT: IT WAS A ONE OR TWO PAGE I THINK –

MR. BROOKS: IT WAS A TWO PAGE.

MR. MARINOFF: THAT'S CORRECT.

THE COURT: THAT'S ALL I HAVE RECEIVED, AS FAR AS I KNOW.

MR. BROOKS: YES, SIR. I DON'T BELIEVE I HAVE THE TRANSCRIPT YET, SO THAT'S – THAT WAS THE BEST I COULD BY [sic] GETTING IT TO YOU BY NOON ON MONDAY.

THE COURT: I WILL ACKNOWLEDGE RECEIPT OF BOTH OF YOUR BRIEFS AND SUPPORT OR MEMORANDA IN SUPPORT. I HAVE REVIEWED THAT. I HAVE READ OVER THE MATERIAL THAT WAS PRESENTED AT THE [4] HEARING. I HAVE REVIEWED THE DOCUMENTARY EVIDENCE. ON THE ONE HAND, THE VARIOUS CIRCUITS COURT [sic] OF APPEAL HAVE SAID THAT EYEWITNESS IDENTIFICATION EXPERT TESTIMONY WHEN DENIED IN SEVERAL CASES WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION, WAS NOT AN ABUSE, SO THAT THE AREA OF THE LAW WE'RE CONCERNED WITH; WHETHER OR NOT IT'S DISCRETIONARY. AND, IF SO, WHAT IS THE EXTENT OF THE DISCRETION THAT THE TRIAL COURT HAS.

THE – THE GATEKEEPER RESPONSIBILITY AS PLACED ON THIS COURT BY DECISIONS OF OUR SUPREME COURT, **STATE VERSUS FORET**; **DAUBERT**, A US SUPREME COURT CASE, **DAUBERT VERSUS DOW PHARMACEUTICAL** CASE; **KUMHO** VERSUS – THE **KUMHO** CASE, TIRE CASE; THE REMAINING PARTS OF THE **FRYE** DECISION; **KUMHO TIRE VERSUS CARMICHAEL**. WE ALL KNOW THAT **DAUBERT** WAS LIMITED TO SCIENTIFIC EVIDENCE. SUBSEQUENT TO THE **DAUBERT** DECISION, EXPERTISE WAS ALLOWED IN NONSCIENTIFIC AREAS. SPECIALIZED KNOWLEDGE OF TECHNICAL AREAS; THE GATEKEEPER RESPONSIBILITY WAS ALSO TRANSFERRED INTO THOSE AREAS

AS WELL AS AREAS OF ECONOMICS, PSYCHOLOGY, AND THE OTHER SOFT SCIENCES. THE FOUR FACTORS ENDORSED BY **DAUBERT** AS INDICATORS OF RELIABILITY HAD TO BE APPLIED.

THE STATE OBJECTS THAT THE WITNESS WOULD BE TESTIFYING AS TO THE CREDIBILITY OF THE WITNESS. DEFENSE MOTION DOESN'T WANT TO OFFER CREDIBILITY OR TESTIMONY. BOTTOM LINE IS EACH CASE AND EACH DECISION OF THE RESPONSIBILITY OF [5] THE GATEKEEPING DETERMINATION MUST BE CASE SPECIFIC BASED UPON CASE SPECIFIC FACTS THAT WOULD MAKE IT REASONABLE FOR THE DISTRICT COURT TO CONCLUDE IN ANY CASE THAT THE TESTIMONY WAS NOT RELIABLE BECAUSE IT MAY HAVE FALL [sic] OUTSIDE OF THE RANGE WHERE EXPERTS MIGHT REASONABLY DIFFER AND WHERE THE JURY MIGHT DECIDE OR MUST DECIDE THAT AMONG THE CONFLICTING VIEWS OF DIFFERENT EXPERTS, EVEN THOUGH THE EVIDENCE MAY BE SHARED.

IN THIS INSTANCE, I DO NOT FIND THAT THE TESTIMONY THAT'S BEEN PRESENTED IN THE WAY OF THE PROPOSED TESTIMONY, THE PROPOSED AREA OF THE TESTIMONY, I DO NOT FIND THAT IT FALLS OUTSIDE OF THE ACCEPTABLE STANDARDS. SO, I WILL DETERMINE THAT THIS WITNESS CAN TESTIFY PROVIDED; HOWEVER, THAT IT IS RELEVANT. I WILL NOT

BE DECIDING THE RELEVANT ISSUE UNTIL I HEAR THE TESTIMONY AT THE TRIAL.

SO AS FAR AS THE GATEKEEPER RESPONSIBILITY, I DO GRANT YOU THE RIGHT TO CALL THIS – AND THIS WITNESS WILL BE PRESENTED WITH CREDENTIALS, WILL BE QUALIFIED AND ABLE TO GIVE TESTIMONY IN THE AREAS THAT YOU HAVE INDICATED; HOWEVER, THAT'S PREDICATED UPON TESTIMONY BEING PRESENTED AT THE TRIAL REGARDING EYEWITNESS. IT MAY NOT BE RELEVANT. I DON'T KNOW. I WON'T KNOW THAT UNTIL THE STATE PUTS ITS CASE ON TO TELL ME WHETHER THERE WAS AN IDENTIFICATION. IF THERE IS NO EVIDENCE ON THAT FACT, THEN THE WITNESS FOR RELEVANT PURPOSES, RELEVANCY – IF THERE IS AN [6] OBJECTION, I WILL NOT HEAR THAT WITNESS' TESTIMONY. BUT, OTHERWISE, THE WITNESS WILL BE ABLE TO TESTIFY.

SO THAT'S THE DECISION I HAVE REACHED. I WILL TENDER THE COURT TO – TENDER THE COURT TO THE OFFICERS TO MAKE A – A FORMAL RECORD ON THE STATE'S – ON THE DECISION OF THE COURT, ASSIGN ERROR AND REQUEST WRIT DATE, IF DESIRED. I'LL TENDER AT THIS POINT.

MR. BROOKS: ALL OF THOSE, PLEASE. WE WOULD ASK FOR A WRIT DATE, SAY WITHIN TWO WEEKS, PLEASE.

THE COURT: SO ORDERED. TODAY IS THE 14TH DAY OF JANUARY. THE WRIT DATE, TWO WEEKS, WILL BE THE 28TH. IS THAT A CALENDAR COURT DATE?

MINUTE CLERK: YES, SIR.

THE COURT: IT IS?

MINUTE CLERK: YES, SIR.

THE COURT: 4:30 IN THE AFTERNOON ON THE 28TH WILL BE THE WRIT RETURN DATE.

MR. BROOKS: WE WOULD REQUEST A TRANSCRIPT OF THE COURT'S RULING, AND I'M STILL AWAITING A TRANSCRIPT OF THE HEARING, AND I WOULD ASK THAT THOSE BE DELIVERED FORTHWITH, IF I COULD.

THE COURT: I WILL ASK THE COURT STENOGRAPHER TO INDICATE PROBABILITY OF TIMELINESS ON THE PREVIOUS REQUEST OF THE STATE REGARDING THE TRANSCRIPT AND TODAY'S TRANSCRIPT. WHAT'S THE PROBABILITY OF THAT, YOU WILL BE ABLE TO HAVE THOSE SHORTLY?

MS. LAGATTUTA: IT WAS LAST THURSDAY. I THINK IT WAS THERESA, THOUGH.

[7] **REPORTER'S NOTE:** (COURT REPORTER CONFERS WITH JUDGE JOHNSON; SUSAN JACKS LATHAM WAS THE COURT REPORTER FOR JANUARY 7, 2009)

THE COURT: WERE WE HERE ON THE EVIDENCE PHASE ON THE 7TH?

MS. LAGATTUTA: I HAVE THE TRANSCRIPT OF THE 7TH.

MR. MARINOFF: THE 8TH. THE HEARING OF –

MS. LAGATTUTA: IT'S THE NEXT DAY.

MR. MARINOFF: – THE HEARING OF THIS MATTER WAS ON JANUARY 8TH, YOUR HONOR.

THE COURT: IT'S THE OTHER STENOGRAPHER.

MR. MARINOFF: THAT'S CORRECT.

THE COURT: I'M GOING TO MAINTAIN THOSE DATES, MR. BROOKS. IF YOU FIND THAT THE TRANSCRIPTS BECOME UNOBTAINABLE –

MR. BROOKS: I WILL INFORM THE COURT.

THE COURT: MOTION FOR ADDITIONAL TIME. ALL RIGHT. WHAT ELSE?

MS. LAGATTUTA: JUDGE, PREVIOUSLY WE HAD REQUESTED THAT ANY WRITS TAKEN ON ANY PRETRIAL MOTIONS AT THIS STAGE IN JANUARY BE TAKEN AS EXPEDITED OR EMERGENCY WRITS –

MR. BROOKS: AND THAT WILL BE DONE.

MS. LAGATTUTA: – TO MAINTAIN OUR TRIAL DATE.

THE COURT: THE STATE HAS INDICATED A WILLINGNESS TO ACCOMMODATE THE –

MR. BROOKS: WE HAVE –

THE COURT: – CAPTION.

MR. BROOKS: – NO PROBLEM WITH PUTTING THAT CAPTION ON ANY WRIT THAT WE DO.

[8] **THE COURT:** I WILL ALSO SAY FOR THE PURPOSES OF THE RECORD THAT THE COURT WILL REQUEST, IF ALLOWED TO, THAT THE SUPERIOR COURT RECEIVE THE APPLICATION AND, IF SO, IF IT CAN, ACCOMMODATE THIS COURT AND MAKE A DECISION ON THE MOTION. WE ARE IN A TRIAL PHASE, AND THE PARTIES WILL NEED TO KNOW IF THERE IS A – THE STATUS OF THE – THE ISSUE IN ORDER TO PROCEED.

MR. MARINOFF: ALONG THOSE LINES, YOUR HONOR, I MIGHT REMIND THE COURT THAT THE STATE HAS ALREADY INDICATED ITS INTENT TO TAKE A WRIT ON THE COURT'S RULING OF JANUARY 7TH, WHICH WAS TO BASICALLY HOLD – PLACE A HOLD ON ITS

PREVIOUS DECEMBER 15 ORDER GRANTING US ACCESS TO JURY MANAGEMENT DRIVER'S LICENSE INFORMATION. SO WHILE WE'RE TALKING ABOUT THIS MATTER BEING TAKEN UP BY THE PROSECUTION, PLEASE NOTE THAT THERE IS ALREADY A MATTER THAT THEY ARE, BY ALL INDICATIONS, TAKING UP AS WELL. NO DELAYS SHOULD BE ATTRIBUTABLE TO TRACY YOUNG AS A MATTER OF LAW NOR FACT IN THIS CASE.

THE COURT: ANYTHING ELSE?

MR. BROOKS: NO, SIR.

REPORTER'S NOTE: (JUDGE JOHNSON CONFERS WITH MINUTE CLERK)

THE COURT: ALL RIGHT. WHAT – IN TERMS OF PERSPECTIVE DATES, WE ARE HERE BACK ON THIS CASE ON THE 5TH, AT THIS POINT? IS THAT WHERE WE ARE?

MR. BROOKS: YES, SIR.

MS. LAGATTUTA: YES. IF THEY HAVE FILED [9] THEIR BRIEF AT WHATEVER LEVEL THEY'RE GOING TO FILE IT ON THE DMV.

THE COURT: ALL RIGHT. OTHERWISE, WE ARE ON SCHEDULE. NOTHING ELSE.

MR. BROOKS: AND, JUDGE, WE WOULD ASK FOR A RECIPROCAL DISCOVERY RESPONSE, AND I WOULD JUST ASK THAT THAT

BE REDUCED TO WRITING. I STILL HAVE NOT RECEIVED THAT.

MR. MARINOFF: WELL, YOUR HONOR, OBVIOUSLY THAT WOULD APPLY TO A REPORT. WE HAVEN'T GOTTEN ANY REPORTS. THE TESTIMONY WAS HEARD LIVE IN COURT.

MR. BROOKS: NO. I'M TALKING ABOUT DOCUMENTS AND OTHER THINGS FOR THE TRIAL-IN-CHIEF.

MR. MARINOFF: WE CERTAINLY INTEND –

THE COURT: ALL RIGHT.

MR. MARINOFF: – TO COMPLY WITH OUR END OF THE DISCOVERY. THANK YOU, JUDGE.

THE COURT: DISCOVERY OBLIGATIONS CONTINUE THROUGHOUT THE – THE TRIAL. EVERYONE'S ON NOTICE. ALL RIGHT. WE STAND AT RECESS ON THIS MATTER. WE'LL GO ON WITH THE OTHER PARTS OF THE DOCKET.

(END OF TRANSCRIPT)

[Certificate Omitted In Printing]

STATE OF LOUISIANA

COURT OF APPEAL FIRST CIRCUIT

STATE OF LOUISIANA NUMBER 2009 KW 0154

VERSUS

TRACEY YOUNG MAY 14, 2009

In Re: State of Louisiana, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 10-06-0811.

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

WRIT DENIED.

JMG
EJG

Kuhn, J., dissents and would grant the writ. A witness qualified as an expert by knowledge, skill, experience, training, or education may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. La. Code Crim. P. art. 702. The requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). Herein, relator failed to show that the proposed expert testimony on eyewitness identification met the standard of evidentiary reliability. Moreover, the prejudicial effect of the

proposed testimony outweighs its probative value because of the substantial risk that the expert witness will have a greater influence on the jury than other evidence presented at trial. Such evidence presents the danger of invading the province of the jury and usurping its function. *See* **State v. Higgins**, 2003-1980 (La. 4/1/05) 898 So.2d 1219, 1240; **State v. Stucke**, 419 So.2d 939 (La. 1982).

COURT OF APPEAL,
FIRST CIRCUIT

/s/ Elizabeth D. Nauta
DEPUTY CLERK OF COURT
FOR THE COURT

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #33

FROM: CLERK OF SUPREME COURT
OF LOUISIANA

On the 7th day of May, 2010, the following actions were taken by the Supreme Court of Louisiana in the cases listed below:

APPLICATIONS FOR REHEARING DENIED:

* * *

2009-KK-1177 STATE OF LOUISIANA v. TRACEY YOUNG (Parish of E. Baton Rouge)

* * *

173

(2)

No. 10-176

Supreme Court, U.S.
FILED
OCT 15 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TRACY YOUNG,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

HILLAR C. MOORE III
DISTRICT ATTORNEY

DYLAN C. ALGE*
ASSISTANT DISTRICT ATTORNEY

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
222 St. Louis Street, Fifth Floor
Baton Rouge, Louisiana 70802
Telephone: (225) 389-3453
dalge@ebrda.org

Counsel for the State of Louisiana

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

FACTS AND PROCEDURAL HISTORY 1

ARGUMENT 4

The Court must dismiss Petitioner's writ for want of jurisdiction. The Louisiana state courts were neither presented with, nor did they consider, the federal question petitioner now presents to this court 5

Petitioner's argument is predicated on a misstatement of law. Louisiana has not adopted a *per se* rule concerning expert eyewitness identification testimony 13

CONCLUSION 26

APPENDIX

Petitioner's Application for Rehearing to the Supreme Court, State of Louisiana ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1996) 6, 11

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) 6

Cheairs v. State ex rel. Dept. of Transp. & Dev., 03-0680 (La. 12/3/03), 861 So.2d 536 ..... 13, 15

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 14

Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985) 6

Howell v. Mississippi, 543 U.S. 440, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) 11, 12

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 6, 11

Marks v. U.S., 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) 21

McGoldrick v. Compagnie Gererale Transatlantique, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940) 6

Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Tex., Inc., 343 F.3d 355 (5th Cir. 2003) 22

State v. Chapman, 436 So.2d 451 (La. 1983) 16, 17, 20, 23

TABLE OF AUTHORITIES – Continued

Page

State v. Foret, 628 So.2d 1116 (La. 1993).....14

State v. Higgins, 03-1980 (La. 4/1/05), 898 So.2d 1219, *cert. denied* 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).....17, 18, 23

State v. Young, 09-0154 (La. App. 1 Cir. 5/14/09) 3

State v. Stucke, 419 So.2d 939 (La. 1982).....*passim*

State v. Young, 09-1177 (La. 4/5/10), 35 So.3d 1042 .....*passim*

United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).....23, 24, 25

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).....6

OTHER

La. C.E. Art. 702.....*passim*

La. Sup. Ct. Rule IX 10

FACTS AND PROCEDURAL HISTORY

On the evening of September 8, 2006, twenty-one year-old Aaron Arnold and twenty-six year-old Dionne Grayson completed their shifts as waiters at the Olive Garden Restaurant in Baton Rouge, Louisiana. Friends, Arnold and Grayson left the Olive Garden together and walked to their cars. Grayson could not start her car, so Arnold drove Grayson across the street to get some gas. Arnold and Grayson returned to the rear parking lot of the Olive Garden at approximately 11:45 p.m. Upon returning, a man armed with a gun confronted Arnold and Grayson. That man, alleged to be petitioner Tracey Young, demanded money from both Arnold and Grayson. While the armed man made the robbery demand, another man, Sanchez Brumfield,[1] remained in a nearby white Monte Carlo car as the getaway driver. Arnold and Grayson were startled and did not immediately comply with the robber's demands. Irritated by the delay in response, Brumfield yelled to the armed man to "just shoot them." The armed man obliged, firing multiple shots at Arnold and Grayson. Two bullets hit Arnold, striking him in the chest and arm. The gunfire struck Grayson in the legs. The shooter then ran to the getaway car, and he and Brumfield fled the scene. Arnold died as a result of his gunshot wounds. Grayson survived but suffered a severe leg injury.

---

[1] Sanchez Brumfield has already been tried and convicted of the first-degree murder of Aaron Arnold. He has been sentenced to death. His case is on appeal.

Evidence against the alleged shooter, petitioner Tracey Young, includes two photographic lineup identifications made by Dionne Grayson and Nancy Segura. Segura, a Mexican national who worked as restaurant kitchen staff, also witnessed the murder. Both Grayson and Segura identified petitioner as the shooter from six-person photographic lineups. Both Grayson and Segura were shown multiple photographic lineups prior to being shown the lineup containing petitioner. Neither Grayson nor Segura chose a person from the prior lineups. A suppression hearing has already been conducted as to Grayson's identification, and her identification has been deemed admissible. Segura's suppression hearing has been postponed pending her return from Mexico.

In addition to these identifications, the state has corroborating evidence implicating petitioner, including, but not limited to: multiple eyewitnesses placing a white Monte Carlo getaway car at the scene during the time of the crime; petitioner's registered ownership of the same model white Monte Carlo vehicle, as well as his admitted use of the vehicle at the time of the crime; a videotaped statement by Brumfield implicating both himself and petitioner as having committed the crime; petitioner's estranged wife's observing drastic changes in petitioner's physical appearance and behavior immediately following the crime, as well as his indicating to her a sudden desire to want to move to California.

On November 9, 2006, an East Baton Rouge Parish grand jury indicted petitioner Tracey Young

for having committed the first-degree murder of Aaron Arnold. The state subsequently provided notice of its intent to seek the death penalty. Numerous pre-trial motions were filed in the case, including a defense motion to qualify Dr. Roy Malpass as an eyewitness identification expert.

On January 8, 2009, the trial court considered petitioner's motion to qualify Dr. Malpass. Over state objection, the court qualified Dr. Malpass as an expert in eyewitness identification psychology. At the conclusion of the hearing, the court deferred ruling on the question of whether Dr. Malpass should be prohibited from testifying because his testimony was unreliable and irrelevant. Then, on January 14, 2009, the trial court ruled that Dr. Malpass could testify as an eyewitness identification expert as long as his testimony was relevant.

The state sought writs to Louisiana's First Circuit Court of Appeal. On May 14, 2009, the court of appeal, in a two-to-one decision, denied the state's writ application. *State v. Young,* 09-0154 (La. App. 1 Cir. 5/14/09) (Kuhn, J. dissenting) (unpublished). The state then filed a writ application to the Louisiana Supreme Court. Oral arguments were conducted, and on April 5, 2010, that court granted the state's writ application and reversed the trial court ruling. *State v. Young,* 09-1177 (La. 4/5/10), 35 So.3d 1042. Petitioner filed an application for rehearing, which was denied on May 7, 2010. *State v. Young,* 09-1177 (La. 5/7/10). Petitioner then sought a writ of certiorari

with this Court. Pursuant to this Court's order, the state now submits the instant response.

ARGUMENT

Petitioner has asked this Court to consider whether a *per se* rule regarding the introduction of eyewitness identification expert testimony would violate the United States Constitution. For multiple reasons, petitioner's writ application to this Court must be dismissed. Initially, this Court must decline to extend jurisdiction because the federal question petitioner now presents was neither presented to, nor considered by, the Louisiana courts at any stage of the state court proceedings. Additionally, petitioner's recently discovered federal claim must also be dismissed because his claim is predicated on a misstatement of Louisiana law. Contrary to petitioner's assertion, Louisiana did not adopt a *per se* rule regarding a particular class of expert witness testimony. Rather, in *State v. Young*, the Louisiana Supreme Court actually rejected the state's proposed adoption of a bright-line rule and relaxed prior precedent, determining only that the trial court abused its discretion **in petitioner's case**. Finally, even were one to erroneously assume Louisiana has adopted a bright-line rule respecting a particular form of expert testimony, such an evidentiary rule passes constitutional muster.

THIS COURT MUST DISMISS PETITIONER'S WRIT FOR WANT OF JURISDICTION. THE LOUISIANA STATE COURTS WERE NEITHER PRESENTED WITH, NOR DID THEY CONSIDER, THE FEDERAL QUESTION PETITIONER NOW PRESENTS TO THIS COURT.

Initially, the state submits that this Court cannot extend jurisdiction to review petitioner's claim that his Sixth and Fourteenth Amendment rights have been violated. Accordingly, this Court must dismiss the application for want of jurisdiction.

28 U.S.C.A. §1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Absent very rare exceptions, this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C.A. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court

that rendered the decision now sought to be reviewed. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1996). *See also Heath v. Alabama,* 474 U.S. 82, 87, 106 S.Ct. 433, 436-37, 88 L.Ed.2d 387 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-19, 103 S.Ct. 2317, 2321-22, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940). When the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

In his writ to this Court, petitioner contends that Louisiana has pronounced a *per se* evidentiary rule that may infringe upon his Sixth and Fourteenth Amendment rights. Petitioner's application, however, makes only a blanket averment that this Court has jurisdiction pursuant to 28 U.S.C.A. §1257(a). (Petition, p. 1.) Petitioner's writ provides absolutely no explanation to support why this Court possesses jurisdiction of his case. The lack of explanation is because petitioner altogether failed to present his federal question to the Louisiana state courts.

To be very clear, at no point during any stage of the state court proceedings did petitioner ever scribe, posit, argue, reference, or otherwise advance that a *per se* exclusion of his eyewitness identification expert would be a violation of either the Louisiana or United States Constitutions. Upon a close examination of the **complete** record, the only issue considered by the state courts involved whether witness Dr. Malpass was competent to testify under Louisiana Code of Evidence Articles 403 and 702.

Nowhere in the existing court record did petitioner ever claim that his Sixth and Fourteenth Amendment rights would be violated by the adoption of a bright-line exclusionary rule regarding eyewitness identification experts. Not coincidentally, the trial court expert hearing transcript, the state's supreme court writ application, petitioner's response to that writ application, and petitioner's application for rehearing were neither referenced nor included in petitioner's writ application to this Court. Petitioner's writ application to this Court violated United States Supreme Court Rule 14(1)(g)(i)[2] when it omitted this

---

[2] "If review of a state-court judgment is sought, **specification of the stage in the proceedings**, both in the court of first instance and in the appellate courts, **when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception,**

(Continued on following page)

information. Of course, had these documents been either referenced or provided, petitioner would have submarined any possibility of jurisdiction.

Nonetheless, because this pertinent information was omitted, it has become necessary for this Court to be presented with a proper understanding of the case's procedural history. Understanding that Louisiana had never adopted a *per se* rule of exclusion respecting eyewitness identification experts, the state specifically briefed during the writ process that Louisiana should adopt a *per se* rule and always exclude eyewitness identification experts. *Original Brief on Behalf of the State of Louisiana* (Oct. 14, 2009), (available in 2009 WL 6352151). Upon being presented with this argument, defendant's response briefs, while acknowledging the state's position and strenuously arguing against the adoption of any such *per se* rule, never once mentioned that an adoption of a *per se* rule would violate his Sixth Amendment rights. *Original Brief of Respondent Tracey Young on the Merits*, p. 5 (Nov. 12, 2009), (available in 2009 WL 6352152, "The State asserts that this unbroken line of decisions indicates that Louisiana applies a bright-line rule against expert testimony on eyewitness

---

portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(c)."

identification."); Not even petitioner's *amicus curiae* brief, filed by the Louisiana Association of Criminal Defense Lawyers (LACDL), mentioned a federal issue, much less the federal constitutional issue raised in this writ application. *Amicus Curiae Brief on Behalf of the Louisiana Association of Criminal Defense Lawyers*, (Nov. 16, 2009) (available in 2009 WL 6352153). (*See also Amicus Curiae Brief*, p. 14, 2009 WL 6352153, "While the state is clearly mistaken in arguing *Stucke* created a bright-line rule prohibiting this testimony, it is true that the language of *Stucke* tilts toward a preference of exclusion of evidence [. . .]."). In fact, a critical inspection of petitioner's responses reveals he never referenced the mere terms "Federal," "Constitution," or "Constitutional" in his writings, much less provided a specific allegation that his Sixth Amendments rights would be compromised. Not surprisingly, the Louisiana Supreme Court neither questioned nor considered the possibility of a federal constitutional issue during oral arguments. This omission occurred despite the fact that the state actively sought the adoption of a bright-line rule of inadmissibility during those arguments. And an examination of the *Young* decision shows that the state supreme court relied exclusively upon Louisiana statutory law and case precedent to rule that Dr. Malpass was incompetent to testify. The *Young* opinion, which coincidentally did not adopt a *per se* rule regarding eyewitness identification expert testimony, makes absolutely no mention of any federal issue, much less a possible federal Constitutional issue.

Further negating any claim for jurisdiction is petitioner's application for rehearing, which was filed immediately after the *Young* decision. Despite the fact that the state supreme court had supposedly adopted a *per se* rule prohibiting his expert witness from testifying, petitioner's rehearing writ never mentioned either that (1) the court had adopted *a per se* rule or (2) that the adoption of a *per se* rule now violated his federal constitutional rights. (*Petitioner's Application for Rehearing* is appended at the end of this brief.). Once again, the mere terms "Constitutional" and "Federal" remained conspicuously absent from his rehearing application. While presenting a federal claim for the first time in a state rehearing application would not satisfy §1257, petitioner did not bother attempting to raise the issue on rehearing.[3]

Prior to his writ application with this Court, petitioner's only argument at the state level was that no *per se* rule existed in Louisiana, no *per se* rule should exist in Louisiana, and that the trial court did not abuse its discretion in qualifying Dr. Malpass as an expert. *Original Brief of Respondent Tracey Young on the Merits*, p. 15 (Nov. 12, 2009), (available at 2009 WL 6352152, "This court should make it clear that no *per se* rule excluding expert eyewitness identification testimony exists in Louisiana."). Although clearly

---

[3] *See also* La. Sup. Ct. Rule IX, containing no restriction as to the scope content in a rehearing application.

aware that the *per se* rule was being sought, never once did petitioner state that adopting a *per se* rule would violate his constitutional rights. Petitioner cannot deny he was well aware of the issue. He simply chose to ignore it. He now attempts to pursue a federal issue neither presented nor considered at any state court level.

In *Howell v. Mississippi*, 543 U.S. 440, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005), this Court dismissed a capital petitioner's writ as improvidently granted. In doing so, this Court stated:

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) *(per curiam)*; see also *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (tracing this principle back to *Crowell v. Randell*, 10 Pet. 368, 392,

> 9 L.Ed. 458 (1836), and *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809)).
>
> * * *
>
> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). In the context of § 1257, the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court. Petitioner did none of these things. 543 U.S. 440, 444, 125 S.Ct. 856, 859, 160 L.Ed.2d 873 (2005).

Howell, at 543 U.S. 443-44, 125 S.Ct. 858-59.

Indeed, it is very easy to give a state court notice that a federal constitutional issue should be considered. Nevertheless, like the capital petitioner in *Howell*, this petitioner completely neglected to give the state courts a chance to address any federal question. His *ex post facto* attempt to transform a state court evidentiary ruling into a federal constitutional question is an attempt to circumvent federalism. Petitioner passed on his chance to present his federal issue at the state level, and the State of Louisiana never considered it. Accordingly, his writ

application must be dismissed for want of jurisdiction.

PETITIONER'S ARGUMENT IS PREDICATED ON A MISSTATEMENT OF LAW. LOUISIANA HAS NOT ADOPTED A *PER SE* RULE CONCERNING EXPERT EYEWITNESS IDENTIFICATION TESTIMONY.

In addition to the above, the state submits that petitioner's claim must be dismissed because it is predicated on a misstatement of Louisiana law. *See* United States Supreme Court Rule 15. Petitioner's contention that Louisiana has created a *per se* bar to eyewitness identification experts is inaccurate. Under the present state of Louisiana law, the determination of whether an eyewitness identification expert may testify is made on a case-by-case basis. The state trial court remains "gatekeeper," and any Louisiana defendant possesses the ability to qualify an expert in the field of eyewitness identification.

In Louisiana, the determination regarding the competency of a witness is a question of fact. *Cheairs v. State ex rel. Dept. of Transp. & Dev.*, 03-0680 (La. 12/3/03), 861 So.2d 536, 541. Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

> knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *State v. Foret*, 628 So.2d 1116, 1121 (La. 1993), the Louisiana Supreme Court found the language set forth by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), persuasive for determining the reliability of expert scientific testimony under La. C.E. Art. 702. *Foret*, 628 So.2d at 1121. Thus, Louisiana requires district courts to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admit ed is not only relevant, but reliable." *Foret*, at 628 So.2d 1121-22. More recently, the Louisiana Supreme Court adopted the following three-prong test to determine the admissibility of expert testimony:

> . . . [T]he admission of expert testimony is proper only if all three of the following things are true: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue . . . [Stated another way,] there are three intertwined bases for excluding testimony under Rule 702(1) if the testimony will not assist the trier of fact;

> (2) if scientific evidence is not sufficiently reliable; and (3) if the particular expert does not have sufficient specialized knowledge to assist the jurors.

Cheairs, 861 So.2d at 541-42 (citations omitted).

In *State v. Stucke*, 419 So.2d 939 (La. 1982), a case decided prior to *Foret* and *Cheairs*, a Louisiana defendant contended that a trial court had erred by excluding the testimony of an eyewitness identification expert. *Stucke*, 419 So.2d at 944. In *Stucke*, the trial judge had ruled that a doctor's testimony could not be presented to the jury because grave doubt existed about the competency of the evidence. Specifically, the lower court placed serious concerns on the manner in which the doctor's tests were conducted and the number of variables found within the experiments. The Louisiana Supreme Court agreed, concluding that the trial court did not abuse its discretion in ruling the eyewitness identification expert was incompetent to testify: "We therefore conclude that the trial court did not abuse his discretion in failing to allow the expert witness to testify. The testimony sought to be elicited from him would not have been an aid to the jury." *Stucke*, 419 So.2d at 945.

Concurring, Justice Lemmon wrote to explain that the Court had not adopted a *per se* rule regarding the inadmissibility of eyewitness identification experts:

> Although I agree that the trial judge, under the circumstances of this case, did not abuse his discretion in refusing to permit defendant to offer the testimony of the "identification expert", **it is not necessary to decide whether the trial court must, under *all circumstances*, exclude such testimony as unhelpful to the trier of fact. Trial courts should not view this decision as imposing a "rule of inadmissibility" with regard to expert testimony of the nature offered here**. Rather, trial courts should cautiously approach the question of admissibility of such evidence in each instance and decide whether, under the peculiar facts of the particular case, the "specialized knowledge" of an expert in the form of opinion evidence would assist the jury in deciding the question of identity. See Fed.R.Evid. 702.

Stucke, 419 So.2d at 951 (original emphasis).

The supreme court's refusal to adopt a *per se* bar to eyewitness identification experts was reiterated just one year later in the case of *State v. Chapman*, 436 So.2d 451 (La. 1983). In *Chapman*, the trial court permitted a psychologist to testify concerning research that substantially tended to discredit the accuracy of eyewitness testimony. Fully understanding that *Stucke* allowed for the possibility that eyewitness identification experts could testify in Louisiana, the *Chapman* court referenced Justice Lemmon's concurrence and stated that the trial

court possessed the discretion to accept or reject the doctor's testimony:

> This court held in *State v. Stucke,* 419 So.2d 939 (La.1982), that defendant was not entitled to offer such evidence, on the theory that the potential persuasiveness of this type of testimony might have a greater influence on the jury than the other evidence and might thus invade the province of the jury. A concurring opinion emphasized that the trial judge may (as was done here) exercise his discretion in favor of admitting such evidence, in the interest of justice, when the judge determines that the proffered evidence would assist the jury in deciding the question of identity. 419 So.2d at 951.

Chapman, 436 So.2d at 453, n. 6.

Post-*Chapman*, the Louisiana Supreme Court once again considered the issue of the admissibility of expert eyewitness testimony in *State v. Higgins.* 03-1980 (La. 4/1/05), 898 So.2d 1219, 1239-40, *cert. denied,* 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). In *Higgins,* a defendant alleged the trial court erred by disallowing his eyewitness identification expert to testify. In *Higgins*, the supreme court utilized La. C.E. Art. 702 to determine the competency of the alleged eyewitness identification expert. Understanding that *Stucke* and its progeny had never articulated a bright-line rule, *Higgins* expressed:

> [The] trial judge is vested with wide discretion in determining the competence of an

> expert witness. Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge; h[er] rulings on the qualifications of expert witnesses will not be disturbed in the absence of manifest error." *State v. Stucke,* 419 So.2d 939, 944 (La.1982) (citing *State v. Drew,* 360 So.2d 500 (La.1978)).
>
> Under *Stucke* and its progeny, a trial court **may** exclude expert testimony regarding the reliability of eyewitness identification. *Stucke,* 419 So.2d at 945; *see also State v. Ford,* 608 So.2d 1058, 1060-1061 (La. App. 1st Cir.1992); *State v. Velez,* 588 So.2d 116, 134 (La. App. 3 Cir.1991).

Higgins, 898 So.2d at 1239-40 (original emphasis).

Once again citing Justice Lemmon's concurrence, the court ruled that the trial court did not abuse its discretion in refusing to find the witness competent:

> While the defendant claims that the particular facts of this case present the rare instance in which the "'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity," *Stucke,* 419 So.2d at 951 (Lemmon, J., concurring),. . . .

Higgins, 898 So.2d at 1240.

Finally, in *State v. Young*, the state trial court ruled that Dr. Roy Malpass was qualified as an expert in eyewitness identification and that he had proven eyewitness identification psychology was a reliable science. In *Young*, the Louisiana Supreme Court was called upon to determine whether the trial court's acceptance of Dr. Malpass as a competent expert had been an abuse of discretion.

Well aware that *Stucke* and its progeny had repeatedly declined to adopt a bright-line rule regarding the inadmissibility of eyewitness identification experts, the state expressly prayed for the Louisiana Supreme Court to adopt such a bright-line rule. Although squarely given the opportunity, the court refused to adopt such a position.

In granting the state's writ, Justice Guidry, writing for three justices of a six justice court,[4] declined to overrule *Stucke*:

> **The proposed testimony on the general factors potentially contributing to a misidentification does not satisfy the standard articulated under Louisiana Code of Evidence article 702.** While being aware of the vast discretion to be afforded to trial courts in their determinations of the admissibility of expert evidence, **we find the district court abused its discretion in allowing Dr. Malpass to testify at trial.**

---

[4] Chief Justice Kimball did not participate in the decision.

Young, 35 So.3d at 1050 (original emphasis). Three justices wrote separately, concurring in result. Justice Johnson wrote separately to reiterate that *Stucke* had never served as a complete bar to the admission of expert testimony regarding eyewitness identification:

> Rather than establishing a brightline rule, our jurisprudence has determined that the admissibility of expert witness testimony should be made on a case by case basis. In *State v. Chapman,* 436 So.2d 451, 453 (La.1983), the trial court allowed expert testimony concerning studies which generally reflected the fallibility of eyewitness identification in certain circumstances. Although the question of admissibility was not an issue on appeal in *Chapman,* this Court, in a footnote, cited the *Stucke* decision, and discussed the concurring opinion in *Stucke* which emphasized the trial court's discretion in admitting such evidence, in the interest of justice, when the court determines that the proffered evidence would assist the jury in deciding the question of identity. [. . .]
>
> In the case at bar, I agree, that based on the facts presented, the majority is correct in vacating the trial court's ruling admitting the expert testimony because there were multiple eyewitnesses, and ample corroborating evidence to support defendant's conviction. The fallibility of human perception and memory, in general, is consideration in those cases where the lone witness' identification is not supported by other testimony or evidence.

> It is my view, that expert witness testimony regarding the reliability of eyewitness identification is not *per se* inadmissible in every case."

Young 35 So.3d at 1051-52. Justice Knoll concurred separately to write in favor adopting a bright-line rule:

> The State has more than convincingly demonstrated an expert's testimony regarding this "field of eyewitness identification psychology" **will never be able** to satisfy the applicable standard. Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this "junk science" is best resolved **by the adoption** of a *per se*/bright-line rule of inadmissibility.

Young, 35 So.3d at 1052 (original emphasis). Finally, Justice Weimer wrote a brief concurrence stating that, "[b]ecause there are facts in this matter which corroborate the eyewitness identification, I concur in the result." *Young*, 35 So.3d at 1052.

Young is the Louisiana Supreme Court's most recent pronouncement on the topic of eyewitness identification experts. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' *Marks v. U.S.*, 430 U.S. 188, 193 97 S.Ct. 990, 993 51 L.Ed.2d 260 (1977).

Thus, it is well established that when a court is confronted with a plurality opinion, the court must, "look to that position taken by those Members who concurred in the judgments on the narrowest grounds." *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Tex., Inc.*, 343 F.3d 355, 358 (5th Cir. 2003). In *Young*, three justices reaffirmed *Stucke*, a case that had never been viewed as placing a *per se* bar on allowing eyewitness identification experts to testify. Concurring, Justice Johnson shunned any possible *per se* rule regarding eyewitness experts and stated that the admissibility of such testimony must be considered on a case-by-case basis. Finally, Justice Weimer also eschewed the adoption of a bright-line rule, noting the circumstances of the case dictated exclusion of the witness.

The state agrees with Justice Knoll that the field of eyewitness identification psychology cannot and will not be a reliable science. Indeed, the field of eyewitness identification psychology is a "junk science." However, Justice Knoll was the **only** justice who believed that Louisiana should adopt a *per se* rule, and one-sixth of a court does not set precedent. Justice Knoll's declaration that she would adopt a *per se*/ bright-line rule necessarily conceded that Louisiana still had yet to adopt such an approach. If Louisiana actually had a *per se* rule regarding this issue, Justice Knoll's concurrence would have been completely unnecessary.

Stucke set the precedent that eyewitness identification expert testimony would not be deemed

inadmissible "in all circumstances." That precedent was followed in *Chapman* and *Higgins*, and it remains in effect to this day. The narrowest interpretation of *Young* leads to the undeniable conclusion Louisiana did not adopt a *per se* rule of inadmissibility for eyewitness identification expert testimony. In fact, the narrowest interpretation of *Young* means that Louisiana has relaxed its position with respect to the field of eyewitness identification. And notably, while their reasons varied, all six justices could agree that Dr. Malpass' testimony was not appropriate in petitioner's case.

While the state might have "won" its writ application at the state court level, it "lost" in its attempt to have Louisiana adopt a *per se* rule regarding eyewitness identification testimony. From *Stucke* to *Young*, Louisiana has repeatedly refused to erect a *per se* barrier to the expert testimony petitioner sought to introduce. On at least one occasion, an expert in eyewitness identification has testified in Louisiana. Unfortunately for the state, the *Young* decision keeps the issue of expert eyewitness identification qualification on a case-by-case basis.

La. C.E. Art. 702 allows a court to exclude scientific evidence when it is unreliable or will not assist a trier of fact. It is not a *per se* rule. A *per se* evidentiary rule, one like the military evidentiary rule[5] this Court

---

[5] The *per se* rule considered in *Scheffer* was Military Rule of Evidence 707(a), which provided in relevant part:

(Continued on following page)

considered *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), mandates that a court take a particular action with respect to the evidence. A *per se* rule does not give a court discretion to abuse. Given the testimony provided by Dr. Malpass at the January 8th expert hearing, it is truly amazing that any court could ever find the field of eyewitness identification sufficiently reliable. Regardless, Louisiana did not create a *per se* rule simply because it determined Dr. Malpass was an incompetent witness. Dr. Malpass is an incompetent witness, but a Louisiana defendant still remains free to establish that his eyewitness identification expert is competent to testify. Of course, that defendant's purported expert must be able to prove how the scientific field is both reliable and relevant. Here, the trial court abused its discretion as "gatekeeper" because Dr. Malpass did not establish how his field of science was reliable or how his testimony would assist the trier of fact in petitioner's case.

Had Louisiana actually adopted a *per se* rule with respect to eyewitness identification expert testimony, such a rule would be constitutional under the eight-justice holding espoused in *Scheffer*. The

---

Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence. *Scheffer*, 523 U.S. 306-07, 118 S.Ct. 1263.

complete lack of consensus and ongoing good faith debate as to whether the science of eyewitness identification can ever be reliable allows individual jurisdictions, which possess a legitimate interest in ensuring reliable evidence is presented to the trier of fact, to reasonably reach differing conclusions on whether to admit such evidence. *Scheffer*, 523 U.S. 308-12, 318, 118 S.Ct. 1264-66, 1269. However, the undeniable fact remains that there is no *per se* rule in Louisiana respecting experts in eyewitness identification. The state cannot be forced to combat a rule that does not exist. Petitioner may not be pleased with his result, but he cannot misstate the law to construct a Constitutional claim.

CONCLUSION

WHEREFORE, the State of Louisiana prays that petitioner's application for writ of certiorari be dismissed and/or denied.

Respectfully submitted,

HILLAR C. MOORE III
DISTRICT ATTORNEY

DYLAN C. ALGE*
ASSISTANT DISTRICT ATTORNEY

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
222 St. Louis Street, Fifth Floor
Baton Rouge, Louisiana 70802
Telephone: (225) 389-3453
dalge@ebrda.org

Counsel for the State of Louisiana

**Counsel of Record*

SUPREME COURT
STATE OF LOUISIANA

2009-KK-1177

STATE OF LOUISIANA

Versus

TRACEY YOUNG

APPLICATION FOR REHEARING ON BEHALF OF
TRACEY YOUNG

TO THE DECISION OF THIS COURT
RENDERED APRIL 5, 2010

ON WRIT OF REVIEW TO THE

FIRST CIRCUIT COURT OF APPEAL
NUMBER: 09-KW-0154

NINETEENTH JUDICIAL DISTRICT COURT
NUMBER: 10-06-0811

Respectfully submitted:

/s/ Mark D. Plaisance
MARK D. PLAISANCE (#23259)
Appellate Attorney

MARGARET E. LAGATTUTA (#21195)
Assistant Public Defender

MARK V. MARINOFF (#8440)
Assistant Public Defender

Office of Public Defender
Michael A. Mitchell, Chief/Director
300 Louisiana Avenue
Post Office Box 3356
Baton Rouge, Louisiana 70821-3356
Tel: (225) 389-3150
Fax: (225) 389-8800

APPLICATION FOR REHEARING

The application of **Tracey Young** respectfully represents:

A.

Tracey Young is aggrieved by the recent opinion of this Court. That opinion – which establishes a per se proscription against all eyewitness-identification expert testimony – is irreconcilable with the United States Supreme Court's decision in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**[1] There, the Court cautioned against categorical prohibitions of entire classes of expert conclusions; advising that in determining whether to admit testimony, the focus "must be solely on principles and methodology, not on the conclusions that they generate."[2]

This Court's decision ignores that principal, focusing rather on the results rather than the method:

> The proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702 **because** the testimony will not aid the jury in its deliberations and, instead, is inclined to be more

---

[1] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[2] 509 U.S. at 595.

prejudicial than probative in value.[3] **(Emphasis added).**

To meet the mandates of **Daubert**, this Court should grant a rehearing and vacate its bright-line ruling, adopting a framework for lower courts to apply on a case by case basis.

B.

Second, this Court's opinion overlooks the plethora of research that scientifically supports the admissibility of eyewitness identification. Courts across the country recognize that while compelling, eyewitness testimony may be the least reliable.[4] Decades of studies that have established eyewitnesses are prone to identifying the wrong person as the perpetrator of crime have convinced courts that expert testimony is necessary to adequately educate a jury regarding factors such as (1) the difficulties with cross-racial identification, (2) the deficiencies in human perception and memory, and (3) the confidence or lack of confidence in the identification in light of lighting conditions, distinctiveness of the culprit's appearance and the presence of a weapon or other distraction. Testimony of this nature does not invade the

---

[3] **State v. Young**, 2009-1177, p. 9 (La. 4/5/10), ___ So.3d ___.

[4] **United States v. Moore**, 786 F.2d 1232 (5th Cir. 1986) (the scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point).

exclusive province of the jury but provides the jury useful information to use in evaluating an eyewitness's testimony.

C.

Third, expert testimony on eyewitness testimony is not more prejudicial than probative. It does not, as this Court believes, focus upon the things that produce error without reference to those factors that improve the accuracy of identifications. The use of eyewitness expert testimony **is not** predicated upon a presumption of a misidentification, but merely serves to educate the jury on factors to consider in evaluating whether an identification is correct. These factors can just as easily convince a jury as to the reliability of an eyewitness identification as it can foster a disbelief. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision.[5]

D.

Finally, this Court has relied upon distorted facts. While there are two persons who allegedly witnessed the murder of Aaron Arnold and the shooting of Dionne Grayson, only Grayson has consistently appeared at court hearings. The East Baton Rouge Parish District Attorney's Office has continually

---

[5] **State v. Clopten**, 223 P.3d 1103, 1109 (Utah 12/18/09).

failed since 2006 to produce Nancy Sedora, an illegal alien who does not speak English and who did not provide police with details of the incident. Moreover, the numerous pieces of physical and forensic evidence, bullet casings, cigarette butts, chewing gum and fingerprints from a vehicle, do not implicate Young.

Therefore, this is precisely the type of case in which eyewitness-identification expert testimony would be of particular use. Expert testimony should be admitted when there is no other inculpatory evidence presented against the defendant with the exception of a small number of eyewitness identifications.[6]

E.

This application complies with Louisiana Supreme Court Rule IX. Defendant moves simultaneously for an extension of time until April 30, 2010, in which to file a memorandum in support of this application.

---

[6] **United States v. Moore**, 786 F.2d 1308 (5th Cir. 1986) (In a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged . . .)

F.

Young, therefore, prays that this Court grant his application for rehearing and thereafter order that the opinion issued March 4, 2010 be withdrawn. Young prays that this Court issue a substitute opinion that finds admissible under Louisiana Code of Evidence Rule 702 and relevant under Louisiana Code of Evidence Rule 403 expert eyewitness testimony or minimally adopts a framework for trial courts to apply on a case by case basis.

/s/ Mark D. Plaisance
MARK D. PLAISANCE
Appellate Counsel

SWORN TO AND SIGNED before me on this 16th day of April 2010.

/s/ John Brown
NOTARY PUBLIC

John Olin Brown, LA
Notary Public #9332
My Commission
is for Life

[Verification Of Service Omitted In Printing]

174

(3)

No. 10-176

In The

Supreme Court of the United States

TRACEY YOUNG,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

REPLY BRIEF OF TRACEY YOUNG

MARK D. PLAISANCE
OFFICE OF PUBLIC DEFENDER
EAST BATON ROUGE PARISH
300 Louisiana Avenue
P.O. Box 3356
Baton Rouge, LA 70821-3356
Tel: (225) 389-3150
Fax: (225) 389-8800
Plais77@aol.com

(Counsel of Record for Petitioner)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
FACTS AND PROCEDURAL HISTORY	1
ARGUMENT	2
A. This Court has jurisdiction to review this application and to grant certiorari	2
B. The Louisiana Supreme Court has per se forbade the admissibility of eyewitness identification testimony	5
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 4

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2143, 90 L.Ed.2d 636 (1986) 1, 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 1, 3, 12

Hawaii v. Office of Hawaiian Affairs, 556 U.S. ___, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009) 3

Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) 5

Oregon v. Guzek, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) 3

State v. Ammons, 208 Neb. 797, 305 N.W.2d 812 (1981) 10

State v. Bozeman, 2006-679 (La. App. 5 Cir. 1/20/07), 951 So.2d 1171 (unpublished) 11

State v. Chapman, 436 So.2d 451 (La. 1983) 7

State v. Collins, 2009-0050 (La. App. 1 Cir. 8/12/09) 11, 12

State v. Ford, 608 So.2d 1058 (La. App. 1 Cir. 1992) 8, 9

TABLE OF AUTHORITIES – Continued

Page

State v. Foret, 628 So.2d 1116 (La. 1993) 1, 3

State v. Higgins, 2003-1980 (La. 4/1/05), 898 So.2d 1219, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005) 9, 10, 11

State v. Stucke, 419 So.2d 939 (La. 1982) .....*passim*

United States v. Smith, 621 F.Supp.2d 1207 (M.D. Ala. 2009) 3

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 2

STATUTES

28 U.S.C. §1257(a) 2

Louisiana Code of Evidence article 403 .....4, 9

Louisiana Code of Evidence article 702 .....4, 8

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment 4

Sixth Amendment 4

FACTS AND PROCEDURAL HISTORY

Pending before this Court is the Petition for Writ of Certiorari by Tracey Young, indicted for first-degree murder in Louisiana. The State of Louisiana seeks the death penalty. Young's application challenges whether the Louisiana Supreme Court's proscription of an eyewitness identification expert violates his constitutional right to present a defense under the Sixth Amendment of the United States Constitution.

Moreover, Young alleges that the Louisiana ruling – in which the state Supreme Court emphatically held that it declined to overrule a prior decision "barring the admissibility of eyewitness identification testimony" – prevents the state trial court from ever deciding whether the proposed testimony meets the requirements for admissibility of scientific testimony espoused by this court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and adopted in Louisiana in *State v. Foret*, 628 So.2d 1116 (La. 1993).

Young also contends that the Louisiana Supreme Court decision prevents him from a "meaningful opportunity" to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2143, 90 L.Ed.2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), in that it violates this Court's prohibition against state rules of evidence that exclude "whole categories" of testimony on the basis of a presumption of unreliability. *See*

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Thus, Young files this Petition for Writ of Certiorari asking this Court to resolve the question of whether the *per se* proscription of eyewitness identification expert testimony violates a criminal defendant's constitutional right to present a defense.

Initially, the State of Louisiana waived its right to file an opposition brief. Now, in its response filed pursuant to an order of this Court, the State of Louisiana claims that this Court lacks jurisdiction to consider Young's Petition for Writ of Certiorari on the grounds that (1) the Louisiana courts did not consider the federal question Young now presents, and (2) Louisiana has not adopted a *per se* rule concerning expert eyewitness identification testimony.

Young files this reply brief, contending that prior opinions from this Court grant it jurisdiction to reverse the Louisiana decision.

ARGUMENT

A. This Court has jurisdiction to review this application and to grant certiorari.

Under 28 U.S.C. §1257(a), this Court has jurisdiction to review a final judgment or decree from the highest court of a state where the validity of a treaty or statute of the United States is at question or where the validity of a statute of any state is repugnant to

the Constitution or laws of the United States. This Court has interpreted this provision to grant it jurisdiction to review state-court determinations that rest upon federal law, *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), or decisions that are interwoven with federal law. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ___, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009), citing *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

A simple reading of the *Young* decision demonstrates that the decision rests upon, and is interwoven with, federal law.

First, the Louisiana Supreme Court decision now prevents state trial courts from performing its "gatekeeping" duty articulated in *Daubert*, where this Court established the principles trial courts should employ when evaluating expert testimony. The core of this Court's ruling in *Daubert* is that lower courts must consider whether the methodology underlying the proposed testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts at issue. As this Court held – and the Louisiana Supreme Court adopted in *Foret* – the admissibility determination is a function reserved to the trial court. A per se proscription against all eyewitness identification expert testimony prevents a trial court from performing this function and violates *Daubert*'s rule against "eschew[ing] such categorical prohibitions of entire classes of expert conclusions." *United States v. Smith*, 621 F.Supp.2d 1207, 1211 (M.D. Ala. 2009). In this respect, the *Young* decision is

not only interwoven with federal law, it violates established principles of this Court.

Second, the categorical prohibition of expert eyewitness testimony violates the defendant's right to present a defense. The right of an accused to present a defense is one of the most fundamental Constitutional rights. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). It is rooted in the Due Process Clause of the Fourteenth Amendment and in Confrontation Clauses of the Sixth Amendment, *Crane*, supra. Its protection is not predicated on whether the defendant invokes the right, a claim that the State of Louisiana relies upon in an effort to convince this Court that it does not have jurisdiction.

In support of its argument, the State of Louisiana contends that the only issue considered by the state courts involved whether witness Dr. Roy Malpass was competent to testify under Louisiana Code of Evidence articles 403 and 702. Judging Dr. Malpass's competency is not what the Louisiana Supreme Court addressed in the *Young* decision. While the court held that Malpass's testimony was inadmissible, it did so by reaffirming a long-standing rule "barring the admissibility of eyewitness identification testimony." *Young*, 2009-1177, p. 14 (La. 4/5/10), 35 So.3d 1042, 1051. In other words, the Louisiana Supreme Court ruled that Dr. Malpass could not testify because in Louisiana eyewitness identification testimony is never admissible. This absolute prohibition against calling an expert in

eyewitness identification denies Young the right to present a defense; it violates a most basic federal rule of the United States Constitution, which this Court has jurisdiction to enforce. *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).

Third, and finally, the State of Louisiana ignores the plethora of federal court decisions that the Louisiana Supreme Court relied upon to make its decision. The state court interweaves the federal law to distinguish what it perceives to be the prejudicial nature of expert eyewitness testimony. It relies upon these federal cases to support its decision to exclude expert eyewitness testimony. Given this extensive reliance on federal law and federal jurisprudence, the State of Louisiana cannot overcome that sufficient jurisdictional grounds exist for this Court to review the Louisiana Supreme Court decision.

B. The Louisiana Supreme Court has per se forbade the admissibility of eyewitness identification testimony.

Although the Louisiana Supreme Court majority opinion did not use the term, *per se*, it clearly adopted a bright-line or "*per se*" rule that bars the admissibility of eyewitness identification testimony. *See Young*, 2009-1177, pps. 13-14 (La. 4/5/10), 35 So.3d at 1050 (. . . we decline to overrule our decision in *Stucke* barring the admissibility of eyewitness identification

testimony).[1] The Louisiana court eliminated the possibility of the introduction of such testimony and does not, as the State of Louisiana now argues, permit such testimony on a case-by-case basis. The poignant evidence in support of this position is the complete absence of any indication by the Louisiana court of the circumstances in which such testimony would be admissible.[2]

The line of decisions in Louisiana that addresses expert testimony on eyewitness identification began with *Stucke*, where the defendant claimed that the trial court erred in excluding the testimony of an expert concerning the quality of a Jefferson Parish

---

[1] Young takes issue with the State of Louisiana's position that he misstates the law. Young clearly indicated in his application, p. 8, fn. 3, that the Louisiana Supreme Court did not use the term *per se* in its opinion. However, see Justice Johnson's concurrence where she argued against the majority's bright-line rule. ("However, I disagree with the majority's finding that *State v. Stucke*, 419 So.2d 939 (La. 1982) serves as a complete bar to the admission of expert testimony regarding eyewitness identification."). Also note that Justice Knoll, also in concurrence, took the position that such testimony is never admissible. ("Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this 'junk science' is best resolved by the adoption of a *per se*/bright-line rule of inadmissibility"). 35 So.3d at 1051.

[2] It is ironic that in order to have this Court avoid reviewing this opinion the State of Louisiana now argues that the Louisiana Supreme Court did not adopt a *per se* or bright-line rule. In its brief to the Louisiana Supreme Court, the State vehemently argued that the *Stucke* decision and its progeny established a clear bright-line rule that precludes the admissibility of such testimony.

Sheriff's Office deputy, who, while off-duty, became involved in the chase of an armed robber. The deputy, who was shot while chasing Stucke, identified the defendant from a photographic lineup and later from a physical line-up. In considering this issue for the first time, the Louisiana Supreme Court concluded that the testimony of a psychologist would not assist the jury in its fact-finding mission. The psychologist was called to testify to enlighten the jury as to the quality of the victim's (the deputy's) identification.

The Louisiana Supreme Court noted that the trial court had grave doubt about the competency of the evidence, particularly the expert's methodology – the manner in which the expert created incidents for case crimes and staged them in live situations – and the number of variables in the experiments. It applied the rationale from select cases from outside Louisiana to conclude

> that the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

Stucke, 419 So.2d at 945.

That decision was not modified, as contended by the State of Louisiana, in the *State v. Chapman*, 436 So.2d 451 (La. 1983) decision. While expert testimony

on eyewitness identification was permitted, the admissibility of that testimony was **not** an issue before the Louisiana Supreme Court making the court's reference to that admission dicta. (Emphasis added).

Ten years after *Stucke*, the Louisiana First Circuit Court of Appeal considered the issue of whether an expert on eyewitness identification should be permitted to testify in light of the Louisiana Supreme Court's prior holdings and the enactment of the new Louisiana Code of Evidence that was adopted in 1988 and became applicable January 1, 1989. In *State v. Ford*, 608 So.2d 1058 (La. App. 1 Cir. 1992), the victim was held at gunpoint as she exited her vehicle outside her home. Both the victim and a passerby identified the defendant in a photo lineup. The passerby also identified the defendant in an out-of-court physical line-up. The defendant sought to present expert testimony on eyewitness identification to challenge the fallacy of the identifications. The trial court denied Ford's motion.

The Louisiana First Circuit found no merit to the defendant's assignment of error. It cited two new provisions as applicable, Louisiana Code of Evidence article 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education, may testify thereto in the form of an opinion or otherwise,

and, Louisiana Code of Evidence article 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

The appellate court found *Stucke* consistent with the evidence articles regarding expert testimony and found both applied to Ford's allegations:

> Herein, there was testimony from which the jury could determine the facts based on common knowledge, education, and experience. The opinion evidence about the fallibility of human perception and memory in general was not necessary for the jury to resolve the identity issue.

Ford, 608 So.2d at 1061.

Since then, the appellate courts in Louisiana have continued to affirm trial court rulings that deny expert testimony on eyewitness identification on the basis that any benefit from the proffered testimony would be outweighed by its creation of confusion and undue influence.

The Louisiana Supreme Court reaffirmed its *Stucke* position in *State v. Higgins*, 2003-1980 (La.

4/1/05), 898 So.2d 1219, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005), where a witness, who followed the victim out of a barroom after a night of drinking, came forth to identify the defendant 17 months after the alleged murder. The defendant wished to call an expert in eyewitness identification who would have testified regarding the reliability of eyewitness testimony, specifically, to explain that

> intoxication greatly increases the likelihood of false identification, that little correlation exists between the confidence expressed by an eyewitness and the actual reliability of that witness's identification, that the chance of misidentification increases with the length of time between incident and identification, and that facts gathered from secondary sources after observing the event in question tend to skew a witness's perception of that event.

Higgins, 2003-1980, p. 33 (La. 4/1/05), 898 So.2d at 1240.

Again the Louisiana Supreme Court found that the trial court properly excluded such evidence, relying in part on the Nebraska case of *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 812 (1981), which held that the prejudicial effect of a psychologist's testimony on a witness's identification outweighs its probative value. This Court also reaffirmed its holding from *Stucke*, that the risk of expert testimony on eyewitness identification "will have a greater

influence on the jury than other evidence presented at trial," and such evidence presents the danger of "invad[ing] the field of common knowledge, experience, and education of men . . . " *Stucke*, 419 So.2d at 945; *Higgins*, 2003-1980, p. 33 (La. 4/1/05), 898 So.2d at 1240.

At least twice since *Higgins*, Louisiana courts found no error in the trial court's exclusion of expert testimony on eyewitness identification. In *State v. Bozeman*, 2006-679 (La. App. 5 Cir. 1/20/07), 951 So.2d 1171, the Louisiana Fifth Circuit Court of Appeal found that the trial court did not abuse its discretion in refusing to allow the defendant to present expert testimony on eyewitness identification because the testimony was offered to challenge the credibility of the victim's identification. And in *State v. Collins*, 2009-0050 (La. App. 1 Cir. 8/12/09) (unpublished), the Louisiana First Circuit Court of Appeal again affirmed a trial court ruling to exclude expert testimony on eyewitness identification in a second-degree murder case where a witness, who admitted he never saw the defendant shoot at him or the victim, allegedly selected the defendant from a photographic line-up. While the appellate court found that the trial court did not abuse its discretion in excluding the testimony of an expert on eyewitness identification, it indicated that the trial court's ruling may have been harmless error. Moreover, the court noted that its ruling on this issue was limited to the circumstances of the particular case.

> While the circumstances of the instant case do not warrant a finding of abuse of discretion on the part of the trial court in excluding the proffered expert testimony on the issue of eyewitness identification, we note that jurisprudence has recognized instances where the exclusion of such testimony would warrant reversal, such as where eyewitness testimony provides the sole basis for identifying a defendant.

Collins, 2009-0050, p. 6, fn. 3.

Young goes much further than these opinions and now effectively closes the door to even the possibility of introducing such testimony. It does not permit – as each of these previous opinions seem to indicate – the trial court to judge the admissibility of eyewitness identification testimony against the particular facts of a particular case. Rather, *Young* is a complete bar to the admissibility of eyewitness identification testimony. Nowhere in the opinion does the Louisiana Supreme Court leave open the possibility that such testimony may be admissible or that the trial court can perform its duty in determining the reliability and admissibility of such testimony as outlined in *Daubert*. And as articulated in the Writ of Certiorari, the *Young* decision operates as an unconstitutional bar against a defendant's right to present a defense.

CONCLUSION

This Court has jurisdiction to review and to grant certiorari in this case. The Louisiana Supreme Court opinion directly affects and is interwoven with Tracey Young's right under the federal Constitution to present a defense. Moreover, under the opinion a criminal defendant in Louisiana is now barred, *per se*, from presenting eyewitness identification testimony. If the decision permitted such testimony as the State of Louisiana contends, then the Louisiana Supreme Court would not have overlooked, as it did, that the trial court did not rule Dr. Roy Malpass's testimony admissible, only that it met the reliability test under *Daubert*.

Now, under *Young*, a trial court cannot even perform that gatekeeping role.

Young, therefore, reiterates his Petition for Writ of Certiorari.

Respectfully submitted,

MARK D. PLAISANCE
Counsel of Record for Petitioner